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Supreme Court, U.S.
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In The Supreme Court
of the
United States

OCTOBER TERM, 1990

No.

BLACK CRYSTAL COMPANY, INC.,
Petitioner

V

FIRST NATIONAL BANK OF
LOUISVILLE
Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Given the conflicts of testimony and interpretations of factual developments in this case, did the courts properly construe the evidence and inferences therefrom in the light most favorable to Petitioner in accordance with standards for summary judgment?

2. Did the courts take proper notice of the provisions of the Uniform Customs and Practice for Documentary Credits (UCP), as sanctioned by the Uniform Commercial Code, Article 5-102(4), in interpreting the facts bearing on First National Bank's actions in regards to this letter of credit?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Cases Cited	iii
Statutes	v
Opinions below	2
Jurisdiction	13
Statement of the case	13
Footnotes	28
Reasons for granting the writ	36
Current Case Law	54
Petitioner's claim for damages	58
Footnotes	60
Conclusion	61

TABLE OF AUTHORITIES CITED

Page

Amer.Jurisprudence 2nd.,vol.50,p.7. .. 28

HARFIELD, H., Bank Credits and Acceptance. pp.191-92(5ed.,1974) 29

KINGMAN, BRUNDAGE & SCHULZ, The Fundamentals of Trade Financing (1986) 52

Opin. ICC Bank. Comm. (1980-81) 45

RODRIGUEZ R.M. & CARTER E.E., Internat'l Financial Management(1986)p.163 ... 31

CASES CITED

Anderson v. Liberty Lobby, Inc., 477 U.S. 242-251, 252,1986 41

Asbury Park & Ocean Grove Bank v. National City Bank 35 NYS2d 985 57

Bank of America v. Whitney-Central National Bank,(5th Cir) 291 F 929 57

Banco National de Desarolla v. Mellon Bank, N.A.CIV. A No.82-0938, U.S.Dist Ct.,W.Dist.VA March 11,1983 55

Blakeman v. Mead Containers, 779 F. 2d

1146,1150, (6th Circuit 1985) 36

Commercial Bank v. Gotham Originals, 486 NYS2d 715(CT APP 1985) 54

Henderson v. National Fidel. Life Ins.Co. 257 F2d 917,919 (10th Cir,1958) ... 61

Kellerman v. Pedman, KY, 411 S.W.2d 315 (1967) 61

Koplin v. Kaulkner, KY, 293 S.W.2d 467 (1956) 61

Lustrelon, Inc., v. Prutacher, 178 N.J. Super.128,482 A2d 518 (App Div 1981) U.C.C.1-201-(19)offic.comm.1977 ... 56

M.J. Sales & Distributing Co.,Inc., (bankruptcy)25 B.R.608 55

Pauline's Chicken Villa, Inc., v. KFC Corp.KY 61

People v. Purcell, 70 P. 2d 706,709, 22 Cal.App.2d 126 54

Pubali Bank v. City National Bank, 676 F2d 1326(1982) 56

S.A. v. Trade Bank & Trust, 21 A.D.2d 187, 249 NYS2d 557, 16NY2d 698, 209 N.E.2d 551(1965) 55

Smith v. Hudson, 600 F.2d 60,63, (6th Circuit 1979) 36

United Bank Limited v. Cambridge Sporting Goods Corp., 360 NE2d 943(1976) ... 54

Werner v. A.L.Grootemaat & Sons, 259 N.W.2d 310,315 n.22 (1977) 56

STATUTES

UCP, ICC Art. 54(b) 31

UCC, ICC Art. 10(d) 29

UCP Art. 3(c), ICC Banking Commission 1975-1981 30

UCC Sec. 3-202 (1) 1 28

UCC Sec. 3-404 (1) 31

UCC Sec. 1-201 (1) 31

UCC Sec. 5-114 (a) 33

UCC Sec. 7-502 33

UCC Sec. 8-302 33

UCC Sec. 3-302 33

UCC Sec. 5-105 34

UCC Sec. 3-307 34

UCC Sec. 3-407 (2) 34

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in BLACK CRYSTAL CO.,INC.[1] v. FIRST NATIONAL BANK OF LOUISVILLE, et al. No. 88-5650 below.

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[1] see APPELLATE BRIEF p.28: "Pursuant to 6th.Cir.R.25 - DISCLOS. OF CORP. AFFILIATIONS AND FINANCIAL INTEREST", dated July 28, 1989.

OPINIONS BELOW

The District Court found that on May 25, 1981, Petitioner sent a telex to Respondent bank to notify Taipei bank that Petitioner wanted the credit confirmed. Respondent sent a telex on behalf of Petitioner to Taipei bank reciting Petitioner's request. Two days later, on May 27th, 1981, Respondent, in its own behalf sent another telex to Taipei bank requesting authorization to confirm. The Respondent telex stated ("URGENT, URGENT, URGENT") in part: "Please authorize us by telex tested to confirm this letter of confirmation. Also please amend L/C to read: 'Available against Beneficiary's drafts drawn on Respondent bank of Louisville, Kentucky at 180 days after sight for full invoice cost!'"

On May 28, 1981 Taipei bank by telex agreed to a confirmation of the credit and authorized Respondent to confirm, but

stated that "All other terms and conditions remain unchanged."

The lower court, in the present case: Respondent confirmed Taipei bank credit in Amendment No.9 thereto, the confirmation contained terms at variance with the original credit. Specifically, the confirmation stated that Respondent would pay under the credit 1) on payment of $2,000 of confirmation fee, 2) on drafts presented by United Kentucky Bank, 3) on drafts in conformity with the terms of the credit, and 4) upon reimbursement by the Bank of California International. Those varying terms did not serve to alter the credit, but created a separate, parallel obligation on the part of the Respondent to pay, provided that the confirmation terms and conditions were met. The confirmation was assented to by Brian Perry, Black Crystal. Petitioner now claims that Perry did not understand the confirmation and that he did not have authority to

agree to the confirmation on behalf of Petitioner. The lower court agreed that this is a genuine dispute of fact, but is not material to the resolution of this case.

If Perry were without authority to assent to the confirmation, than the confirmation was presumably ineffective. If the confirmation was ineffective, then Respondent did not "confirm" UCP and was not obliged to pay according to the confirmation. Therefore, Respondent had no obligation to honor UKB presentation of documents and demand for payment, where it was made. On the other hand, if Perry did have authority to assent then Respondent did "confirm" the credit and was obliged to pay according to the confirmation terms. The undisputed facts reveal however, that Petitioner did not meet all of the terms of the credit.

The court order of the Summary Judgment found, the confirmation set June 30, 1981 as

the final date for shipping the coal, and July 10, 1981 as the expiration date of the credit. Thus this court ruling shows, coal was shipped and the presentation was made after the deadline set for each. Because Petitioner did not meet either these deadlines, Respondent was within its right in refusing to honor UKB's demand for payment.

Petitioner implicitly argues that it was unjustifiably prevented from meeting the shipping and expiration dates in the credit as a direct result of Respondent failure to send an authenticating telex to Banco Urquijo. The court cannot agree, Respondent was under no obligation to send or receive telexes for or on behalf of Petitioner. Therefore, Respondent was justifiably within its rights in failing or refusing to send such a telex. Petitioner offers no other proof that Respondent maliciously or in bad faith failed to send the telex, see KY. Rev.

Stat. 355.5 - 109(1).

In the absence of such evidence, Respondent cannot be held liable for the problems between Petitioner and its shipper which may have caused Petitioner to miss the credit deadlines, see KY. Rev. Stat. 355.5 - 109(1)(b).

Petitioner alleges that UCP Article 41. gave Petitioner 21 days after July 10, 1981 to present the documents and a draft. The court cannot agree.

Consequently, Art. 13 does not by its terms apply to Respondent's petition in this case. Respondent, as discussed above, was a confirming bank and under its confirmation it had the obligation to pay money upon presentation of a draft by UKB which was in conformity with the credit. Moreover, Respondent had not only the right but the duty to its customer, Taiwan bank, to inspect the documents before payment and to insist upon

strict compliance with the terms of the credit, including adherence to the stated shipping and expiration date. In Petitioner's view, these rights and duties fell to UKB as the negotiating bank. The district court cannot agree.

Petitioner asserts that it selected UKB as the negotiating bank and that UKB received, reviewed and approved all the documents presented by Petitioner amounted to negotiation, as a matter of law. Relying on UCP Art. 13. Petitioner then argues that once the documents were negotiated that Petitioner had fulfilled its contractual obligations under the credit. At that point Petitioner concludes, Petitioner had the right to payment and Respondent had an obligation to pay. Under Petitioner theory, under negotiation, Respondent no longer had the right to inspect the documents presented for discrepancies, nor the right to refuse pay-

ment of the credit draft on the basis of variance with the terms of the credit. The Court cannot agree.

Nevertheless, the District Court Order of Summary Judgment stated that on July 27, 1981 representatives of UKB and Petitioner visited the New York office of the Bank of California and delivered documents intended to be in satisfaction of the terms and conditions of the credit. The Bank of California examined the documents, found discrepancies and refused to pay. A Petitioner representative returned to the Bank of California office on July 28, 1981 with proposed amendments but the Bank still refused to pay. The Bank of California sent a telex to UKB on July 29, 1981 enumerating the discrepancies in the documents and calling attention to the instruction from Taipeibank not to pay. The District Court, first can find no support for Petitioner position in the case

law or legal treaties dealing with the UCC or the UCP or the law of documentary credits generally.

In the credit in this case, the only third bank nominated by the issuing bank as a reimbursing bank was the Bank of California.

COURT OF APPEALS

On appeal, the Court of Appeals fully agreed on the District Court Summary Judgment and adopted its perspective as it was its own written opinion. "There is no genuine issue as to any material fact."

COURT OF APPEAL'S REASONING

On appeal, the Court of Appeals upheld the District Court's finding "for the reasons fully detailed by the District Court in its well-written opinion which we fully adopt as though it were our own, we affirm."

The Court of Appeals concluded after carefully examining the record, "we conclude

that Summary Judgment for Respondent was appropriate because there is no genuine issue as to any material fact."

A court deciding a motion for Summary Judgment must consider whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the party must prevail as a matter of fact.

Anderson vs. Liberty Lobby. Inc. 477 U.S. 242-251-52 (1986)

"[O]n a motion for Summary Judgment the movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all influences to be drawn therefrom must be read in the light most favorable to the Party opposing the motion."

Blakeman vs. Mead Containers, 779 F. 2d 1146, 1150 (6th Cir.1985), quoting Smith vs. Hudson, 600 F. 2d 60, 63, (6th Cir),

Cert. Dismissed, 444 U.S. 986 (1979). Petitioner argues that the summary judgment was inappropriate in this case, because "the facts are immensely in dispute." Petitioner claims that it timely submitted the documents required by the court to UKB, a bank claimed by Petitioner to be a negotiating bank. The Court of Appeals did not accept this statement. The record according to the discovery of this court finds no support for the Petitioner claims.

The appeal finally does not allow the Petitioner argument that the District Court erred in failing to consider the application of Petitioner waiver and estoppel theories.

The court will not accept Petitioner's argument that UKB acted as a negotiator of the letter of credit.

The undisputed testimony of the UKB's Officer was that at no time did UKB negoti-

ate the letter of credit. On reviewing the supporting fact, we agree.

(Court of Appeals Case No. 88-5650: "Not Recommended For Full - Text Publication.") Sixth Circuit Rule 24 limits citation to special situations.

Petitioner requested rehearing en banc.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the ori-ginal panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. ACCORDINGLY, THE PETITION IS DENIED.

JURISDICTION

The district court filed its opinion on May 11, 1988, and timely notice of appeal was filed in the district court on June 16, 1988. The note for publication Opinion of the Court of Appeals was filed May 1, 1990. The Petition for Rehearing was denied on June 15,1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1332.

STATEMENT OF THE CASE

A. Lucky Cement Corp. Taipei, Taiwan signed a contract for delivery to Suoa, Taiwan, 126,000 Metric Tons of coal on January 30, 1981 with Black Crystal Co., Export Div., San Francisco, a General Partnership. The coal was to be shipped in five shipments, from 26,400 metric tons each, from the U.S.A to Taiwan. Lucky Cement had an irrevocable letter of credit issued by the City Bank of Taipei, Taiwan, for the benefit of Black

Crystal Company (hereinafter: Petitioner).

On February 18, 1981 the credit was sent by a tested telex to the First National Bank (hereinafter: Respondent) with the opening words, as follows: "Please advise thru United Kentucky Bank, Louisville, (hereinafter UKB). We open irrevocable Credit OTH2/00790/UO, Black Crystal Co., Inc., Export Div., San Francisco, CA. as beneficiary.[1].

The letter of credit did not designate a negotiating bank. The credit designated the Bank of California International, New York, as the reimbursing bank. The L/C did not appoint a negotiating bank [2]. The L/C was to be fully negotiatable credit to the bank the benificiary selected to be negotiating bank. It provided that beneficiary must establish a letter of guarantee or stand-by L/C for US$53,460.00 via advising bank as performance bond to the Taipeibank in Taiwan. It stated : "To the negotiating

bank only: Upon negotiation of the draft drawn under this credit Pls cable us of the amount negotiated for reimbursement. Pls draw at sight on the Bank of Calif Int'l New York for the face amount of the draft certifying in compliance with the credit terms and conditions..."

The credit stated the latest shipping date was March 29,1981.

The issuing bank requested that its L/C was "Subject to UCP for Documentary Credit (1974 Revision) Int'l Chamber of Commerce Brochure No. 290."

On February 20, 1981, Petitioner designated UKB its "Negotiation" bank. [3].

The first Assignment of Proceeds was issued February 20, 1981 to Brian Perry for the sum of $26,400.00. [4].

The draft was signed by Petitioner the assignee, and by an official of the UKB. In effect, by its agreement, UKB purchased the

draft of $26,400, and those in the various Assignments of Proceeds. See Appendix D.

Around March 27, 1981, the United Mine Workers Union went on strike, thereby causing a crisis in the coal-fields. Therefore Taipeibank on behalf of its customer, Lucky Cement, extended the expiration date of the L/C to April 25, 1981, through Amendment No. 6 [5] of the credit. Due to the United Mine Workers strike and extremely bad weather conditions with heavy rains persisting through May and early June, 1981, Petitioner requested and received two further extensions (Amendments No.7 and No.8) to the credit. The L/C was to expire on June 20, 1981.

On May 25, 1981, Petitioner requested that the L/C be confirmed by UKB. Petitioner sent two Western Union Mailgrams. The first mailgram was sent to UKB of Louisville. The mailgram asked UKB to telex the Taipeibank to request confirmation of the

L/C. The second mailgram was directed to the BOCal. The mailgram indicated that Beneficiary had instructed UKB to seek confirmation [6] of the L/C.

On May 26, 1981, UKB sent a telex to the Taipeibank on behalf of the Petitioner requesting confirmation of the L/C.

On May 27, 1981, Respondent sent a key tested telex labeled "URGENT", "URGENT", "URGENT", without any instructions or permission of the Petitioner, to the Taipeibank requesting authorization by Tested Telex to confirm the L/C, and also to amend the terms of the L/C to read "...available against beneficiaries drafts drawn on FNB at 180 days after sight."

Taipeibank responded on May 28, 1981: "...your tested/25-372 and telex May 27, 1981, please add your confirmation to this credit, confirmation fee at the beneficiary's account. All other terms and conditions

remain unchanged. This is an operative cable amendment." On May 29, 1981 Respondent had the L/C confirmed in its Amendment No.9 [7].

The buyer and the Beneficiary were never informed of the restrictions the Respondent entered in its Amendment No. 9.

The Taipeibank instructed Respondent to confirm the credit.This Amendment (no.9) was signed by a representative of UKB and Bryan Perry, Black Crystal [8]. The L/C was not a transferable credit [9]. The Respondent transformed the L/C into an Irrevocable Straight L/C [9a]. Henceforth the Respondent would only deal with the UKB and not with the actual Beneficiary.

Because of weather conditions, another extension was requested by UKB, on behalf of the Petitioner dated June 16, 1981. On June 22, 1981, the credit was extended to a shipping date of June 30, 1981 and an expiration date July 10, 1981.

June 17, 1981, the last barge was completely loaded and was en route to New Orleans. Belle Chase (New Orleans) was the point on the Mississippi River for loading upon the ocean vessel, EASTERN HORNET [10]. Cerbere & Co. Ltd.,London, UK, (Charterer) agreed on April 21st,1981, by telex to UKB to accept assignment of proceed for ocean freight charges. Cerbere's bank, Banco Urquijo requested Respondent bank to send a tested telex to confirm the credit. However, no such authentication was ever sent by the Respondent bank.

Respondent sent a telex to Cerbere & Co (Charterer) on June 26, 1981 stating that this assignment will become irrevocable at such time as Cerbere & Co Ltd. issue its commitment setting forth name of vessel, its Estimated Time of Arrival, and that vessel had been fixed; that no proceeds can be distributed until they are received by us [11].

Cerbere & Co canceled its Charter Party with Petitioner and claim liability for 126,000 metric tons (total of five shipments) of coal under contract. After the shipping date [12] of June 30, 1981 expired, demurrage charges started to accumulate on 16 loaded barges sitting in midstream.

Due to failure of authentication by Respondent bank the EASTERN HORNET went off market. Petitioner arranged transportation of the coal by spot charter of the vessel SAN NICOLAS from Antares Shipping and Trading Corp., San Francisco. The charter agreement was signed by the Petitioner in San Francisco on June 29, 1981. On July 7, 1981, UKB issued to Antares the last of its several Assignments of Proceeds and signed drafts to the Credit [13]. It retained the originals and mailed copies to each of the assignees.

On July 9 and July 10, 1981, Hassanain,

a V-P of UKB, Louisville, KY, went to New Orleans to observe loading of the coal onto the vessel SAN NICOLAS (see: Deposition pp. 55-70, 83-93, & 424-456 of Hassanain). Hassanain informed suppliers that his bank had received an Amendment extending the shipping and expiration dates to July 13, 1981. This information came from his bank in Louisville based on telex received from Taipeibank. Suppliers then released their possessory liens which permitted T.Smith & Sons, the stevedores, to load the steam coal into the hatches of the vessel.

Hassanain received B/L and commercial documents [14] and returned to Louisville on July 10, 1981. He testified at a deposition [15], that the L/C complied in a timely fashion to the terms and condition of the L/C. On beneficiary's first tender, the negotiating bank, UKB determined that the L/C complied in timely fashion to the terms and

conditions of the UCP.

July 10, 1981, the loading was completed and the vessel was ready to sail. Captain Traiforos, master of the SAN NICOLAS, authorized Sunrise Shipping Company to issue the B/L marked "Freight Prepaid on Board" covering the coal loaded on his vessel. Sunrise Shipping issued the B/L, Hassanain took possession of, on July 10, 1981 in New Orleans. Other documents then in Hassanain's possession were the Weight Certificate issued by SGS Control Services and the Commercial Testing & Engineering Co. analysis of the coal.

July 12, 1981 Hassanain mailed a letter to the BOCal. Intern'l, New York, to the attention of Mr. Lee [16], negotiating and collecting orders of commercial documents and a sight draft signed for $1,507,683.21 by Mr. Hassanain, VP, UKB.

On July 13, 1981, Hassanain sent ano-

ther letter to the Respondent bank for collection, enclosing the documents for the L/C #OTH2/00790/UO in favor of Petitioner. "Attached is a sight draft payable to UKB, Inc. in the amount of $1,507,683.21, signed Youssef Hassanain." [17].

July 13, 1981, Hassanain also mailed two sets of the documents required by the Credit to the Taipeibank. [18].

On July 12, 1981 Hassanain met Attorney Stephen Horner and Bryan Perry at the office of Attorney Horner. The meeting concerned two documents he had received, reviewed and taken possession of in New Orleans on July 10, 1981. He required that the Commercial Invoice that was already signed by the Beneficiary (Petitioner) before the expiration of the Credit be notarized along with the Supplier's Certificate [19]. The L/C did not call for any of the documents to be notarized. [20,21].

Hassanain stated in his deposition [22] that Jean Jackson, Respondent's representative, told him on July 13, 1981 that the L/C had expired and that the UKB signed draft [23], which he attempted to present to her would not be honored because Petitioner had not met its shipping deadline and therefore Respondent was not going to pay UKB for the draft.

On July 15, 1981, two days after Hassanain had sent the L/C documents to Taipeibank, Respondent bank received a Tested Telex from Taipeibank, its message to be relayed to UKB. See appendix E.

By test telexing the purported discrepancies to its correspondent bank, the Respondent bank, with instructions to relay the message to UKB, establishes that the Taipeibank had received the July 13, 1981 telex from UKB, now recognizing it as the negotiating bank. The telex refers to the

two sets of documents which UKB had air-mailed to the Taipeibank following the instructions of the L/C, which explicitly allowed the Beneficiary (Petitioner) to select his own Negotiating Bank (UKB). By this telex of July 15, 1981 to UKB, the Taipeibank has recognized UKB as the Negotiating Bank.

The Petitioner does not recognize the purported discrepancies because Petitioner, having presented the commercial documents within the expiry date of the credit, has never received the signed drafts and documents after they were tendered on July 10, 1981 to the officer of UKB (Hassanain), as it is required by the Official Comment 1 of 5-112 of the UCC.

On July 17, 1981, the BOCal, New York, received a telex from Taipeibank instructing the BOCal not to pay any reimbursement request under the credit. The telex went on to

state that payment should be made "only upon receipt of further instructions."

On July 20, 1981 Taipeibank bank telexed to Respondent bank message which was to be relayed to UKB.

"The payment under L/C OTH2/00790/UO is subject to satisfactory review from negotiating bank on collection basis. No payment is permitted at this moment."

Petitioner became aware of the telexes of July 17 and July 20, 1981 only after reading the District Court Memorandum Opinion [24].

Hassanain, would not give up the commercial documents unless the Assignments of Proceeds/drafts signed by UKB were honored and paid. The Taipeibank's customer Lucky Cement Corp. requested that its bank take the documents to BOCal Intern'l, New York.

On July 27, 1981 representatives of UKB and Bryan Perry visited the New York office

of the BOCal and delivered the documents. BOCal examined the documents and found the same purported discrepancies and refused to honor the credit. The BOCal was never authorized to and never made any payment under the Credit." [25].

Petitioner filed on July 30, 1982 its Third Party Complaint against Respondent of Louisville, KY and BOCal Inter'l, New York (Black Crystal's Third Party Complaint).

All cause of action by and among the various parties were either resolved by dismissal [26], judgment [27] or settlement [28], except for the Third Party Complaint of Petitioner against Respondent. On May 16, 1988, the U.S. District Court of the Western District of Kentucky (District Court) entered its Order granting Respondant's Motion for Summary Judgment against Petitioner (R.246: Order of Summary Judgment).

On June 15, 1988 Petitioner filed its Notice of Appeal in this matter (R.247: Notice of Appeal by Petitioner), and Pre-Argument Statement Rule No.9 on July 5,1988. Counsels Stephen G. Horner and John Wise withdrew as counsel for the Petitioner. The Petitioner's case was dismissed for failure to obtain counsel on January 12, 1989. This Appeal was reinstated on March 16, 1989.

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[1] 50 Amer.Jur. 2d Sec. 7.:
"A letter of credit addressed exclusively to an individual named therein is a special letter of credit, and as such is confined to the named individual and confers upon no one else the right to act upon it. The ordinary letter of credit falls within this category."

[2] [3202] Sec. 3-202 (1)1:
Negotiation is the transfer of an instrument in such a form that the transferee becomes

a holder. If the instrument is payable to order it is negotiated by delivery with any necessary endorsement; if payable to bearer it is negotiated by delivery.

[3] See J.A. vol II pp.30,31 Affidavit P. B. Parson, V-P and Mgr, Bank of Cal., Intern'l: "It was the responsibility of UKB as the negotiating bank, to determine that the shipping and other supporting documents were in order, in accordance with the terms and conditions of the credit."

[4] H. HARFIELD, Bank Credits & Acceptance. pp.191-92 (5ed. 1974):

...a beneficiary assign its rights to receive proceeds to the party from whom it obtains the goods. ...to satisfy its freight obligations out of the proceeds of the letter of credit.

[5] UCC-ICC Art.10(d):

Such undertaking can neither be amended nor canceled without the agreement of the issu-

ing bank, the confirming bank (if any), and the beneficiary. ...amendment is not effective without the agreement of all the above named parties.

(a): An exporter finds it necessary to make amendments to the credit, the exporter should contact the importer, since an advising bank does not have the authorization to initiate amendments.

[6] see Joint Appendix vol. II, p.14: Western Union Mailgram from Beneficiary to UKB: Credit to be confirmed, confirmation. (see vol. II, p.15: Western Union Mailgram from Beneficiary to Bank of Cal., New York: L/C confirmed in our behalf through our advising bank, UKB).

[7] ICC Banking Commission 1975-1981 - UCP Art.3(c):

"Soft Confirmation does not provide" partial acceptance of amendments, is not effective and should not be used without agreement of

all parties thereto.

[8] [3404] Sec. 3-404 (1):

Unauthorized Signatures

Sec. 1-201 (1): "Unauthorized Signature" is a defined term (Sec. 1-201). It includes both a forgery, and a signature made by an agent exceeding his actual or apparent authority.

[9] UCP-ICC art.54 (b) F. Transfer

A credit can be transferred only if it is expressly designated as "transferable", "assignable", and "transmissible", add nothing to the meaning of the term "transferable", and should not be used.

[9a] RODRIGUEZ R.M. & CARTER E.E., International Financial Managment (1986), p.163: with a "straight" L/C, the draft can only be presented to the paying bank designated in the L/C, whereas in a "negotiable" L/C a draft can be presented to any bank willing to act as paying bank.

[10] see Joint Appendix vol. II, p.11 Cerbere's telex to UKB accepting assignment of proceeds, dated Apr.22, 1981, Vessel (Eastern Hornet).

[11] see Joint Appendix vol. II, p.22, Cerbere's telex June 29, 1981 not accepting FNB's terms.

[12] see Joint Appendix vol. II, p.22, Cerbere's last telex communication holding Beneficiary liable, waiting for final bank to bank confirmation.

[13] see Joint Appendix vol. II, p.12, Western Union Mailgram from Beneficiary to UKB, dated 4/29/1981: allotments of funds available, assignments of proceeds to suppliers and other parties.

[13a] Appendix D: Assignments of Proceeds and sight drafts:

(1) to First National Bank July 11, 1981

(2) to Bryan Perry February 20, 1981

(3) to Keiko Sano Feister February 20, 81

(4) Greater Egyptian Energy June 13, 1981

(5) Antares Shipping & Trading Comp. July 7,1981.

[14] [5114] Sec. 5-114 (a): Issuer's Duty and Privilege to Honor Rights to Reimbursement: ... a holder in due course (Section 3-302) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (Section 7-502) or a bona fide purchaser of a certificated security (Section 8-302).

[15] see Docket Sheet Nr. 66, pp.177,324-327, Deposition of Youssef A. Hassanain ...accepted the shipping documents, (commercial documents), found them to meet the terms of the L/C before the expiration date July 10, 1981.

[16] see Joint Appendix vol. II, pp.24,25: attached is is a sight draft payable to UKB.

[17] see Joint Appendix vol. II,pp.23,26,27: attached sight draft payable to UKB.

[18] see Joint Appendix vol. II, p.28: Telex to CBOT from UKB negotiating documents according to L/C terms for a negotiating bank only. Upon negotiation of draft drawn under this credit (see L/C OTH2/00790/UO).

[19] [5105] Sec. 5-105 Consideration No consideration is necessary to establish a credit or to enlarge or otherwise modify its terms.

[20] [3307] Sec. 3-307 Burden of Establishing Signatures, Defenses and Due Course (Sec. 1-201): It means that until some evidence is introduced which would support a finding that the signature is forged or unauthorized the plaintiff is not required to prove that it is authentic.

[21] [3407] Sec. 3-407 (2) Alteration (a) Alteration by the holder which is both fraudulent and material discharges any party whose contract is hereby changed unless that party assents or is precluded from assenting

the defense.

[22] see Docket 66,Deposit. pp.114,174,179.

[23] see Joint Appendix vol. II, p.23 Signed Draft payable to the order of UKB: $1,507,683.21.

[24] Appendix E: Telex dated July 17, 1981 from CBOT to FNB.

[25] see Joint Appendix vol. II, p.19, Telex from Bank Of California to CTC, dated May 30, 1981: We hold in our possession reimbursement authorization.

[26] see Docket Nr. 20, dated Oct. 8, 1982 Third Party Complaint dismissed because it failed to comply with requirements.

[27] see Docket Nr. 229, dated June 6, 1986 Black Crystal should have judgment against Polykyn and Landaf, and recover from Polykyn and Landaf amount of $11,312,416.22 (Present date: Sept 11, 1990 being served in Athens, Greece to the Ministry of Foreign Affairs, U.S.State Department).

REASONS FOR GRANTING THE WRIT

The June 15, 1990 Sixth Circuit denied Petitioner's petition for Rehearing En Banc. The hearing panel "concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case." On May 1, the Court " record reveals no genuine issue of a material fact." The Sixth Circuit cited from a case decided in its own Court:

"{O}n a motion for summary judgment the movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion."

Blakeman v. Mead Containers, 779 F.2d 1146, 1150 (6th Cir.) (1985), quoting Smith v.Hudson, 600 F.2d 60, 63 (6th Cir.). cert. dismissed, 444 U.S. 986 (1979).

Petitioner argues that the lower courts have incorrectly applied the standard in this case.

The Petitioner finds it disturbing that the lower courts have difficulty in applying the articles of the UCP to the particulars of this case. Together with the language of the Credit, the (U.S.) UCC, Sec. 5-102(4) sanctions the application of the UCP in this instance:

"Unless otherwise agreed, this Art. 5 does not apply to a letter of credit or a credit if by its terms or by agreement, course of dealing or usage of trade such letter of credit or credit is subject in whole or in part to the Uniform Customs and Practice for Commercial Documentary Credits fixed by the Thirteenth or by any subsequent Congress of the International Chamber of Commerce."

Petitioner contends that there is an

abundance of evidence in the records to support its claim if "read in the light most favorable" (to the Petitioner), sufficient to require that this Court set aside the summary judgment.

The crucial question of exceptional importance and genuine issue of material fact addressed in Petitioner's petition for Rehearing in the Sixth Circuit court of Appeals was: Whether UKB undertook to act as, and was in fact, the negotiating bank in regard to this L/C?

Petitioner argues that UKB was the Negotiating Bank, that UKB accepted the documents required to negotiate the Credit, that UKB approached Respondant, the confirming bank, for payment against the documents; that Respondant wrongfully dishonored the Credit.

In its May 1, 1990, decision the Court of Appeals found that UKB was not the nego-

tiator of the Credit, and by inference, the Petitioner's arguments concerning the presentation of documents to any bank were moot. The court apparently reached this conclusion by way of its previous statement, finding it significant that: "The undisputed testimony of the UKB's officer, who was responsible for dealing with Petitioner's affairs, was that at no time did UKB negotiate the letter of credit."

Far from the standard for summary judgment imposed in Blakeman (above), the evidence submitted by Petitioner "together with all inferences..." not only does dispute the Hassanain testimony but traces the activities of this same bank's officer in UKB's undertaking to, and subsequently acting as, the Negotiating Bank for this Credit. (See Appellant's Petition for Rehearing, pp.1,3-5,7,8).

A letter of credit itself is a method

of payment created to facilitate the transaction between buyer and seller. It is not a contrivance for the benefit of the banks.

Negotiation of a L/C is a process by which specified documents are given over by the Beneficiary or his agent to a bank which acknowledges their conformity with those called for in the L/C and which then presents them to the bank obligated to make payment.

In the ordinary course of events, the negotiating bank and the confirming bank would be one. Due to Respondent's bizarre wording in its Amendment No.9, even Respondent itself anticipates that UKB will present drafts "on behalf of the Beneficiary" and distribute the proceeds of the L/C - functions of the negotiating bank.

Both, the V-P of BoCal., Peter Parsons Affidavit and the Gary Dilley's (his assistant) deposition state unequivocally that

the UKB was the negotiating bank. Testimony of these two bank experts familiar with this particular L/C contrasted with that of a UKB officer,in an adverse position to Petitioner, and whose paper trail and activity belie his testimony, which certainly creates a condition of "sufficient disagreement to require submission to a jury."

Quoting again from the Sixth Circuit Decision, page 3:

"A court deciding a motion for summary judgment must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S.242,251-52(1986).

The record shows both intent and action on part of UKB to negotiate the Credit. Expert testimony states: UKB was the negotiating bank in this instance. The lower courts

have improperly based their findings only on conflicting testimony by UKB officer Hassa-anain, and representations by Respondent, which refused to pay on the Credit. In this, the element of conclusiveness required for summary judgment is greatly lacking.

The Amendment No. 9:

When Respondent prepared its unauthorized Amendment No. 9 on May 29, 1981, it introduced a number of complications into the letter of credit system which ultimately led to the non-payment of this L/C. Through this "amendment" the Respondent bank attempted to change the nature of the Credit from that of a freely negotiable irrevocable credit to an irrevocable straight credit which would have required the beneficiary to present the documents to Respondent itself on July 10, 1981, the expiration date of the L/C. It thus attempted to restrict the Petitioner's freedom of action.

From this point on, Respondent brazenly acted as if it were in full control of the Credit and the underlying transaction; and also as if it had no need to cooperate with either the Beneficiary, or UKB, which was to act as the negotiating bank on the Credit.

The acting out of these assumptions may explain why the lower courts have believed that UKB did not negotiate the Credit and that Respondent acted correctly in disregarding the interests of the Beneficiary (Petitioner) in communications with the holders of assignments of proceeds.

One characteristic of this Amendment No. 9 should be beyond dispute: That is that it directly violates the regulations governing letters of credit developed by the International Chamber of Commerce, the ICC. The following is in application of the ICC provisions, and UCP Articles in regards to this Amendment No. 9:

1. Neither the Taipei Bank, nor the Beneficiary of the Credit (Petitioner, San Francisco) agreed to this amendment. In fact, the day prior to its issuance the issuing bank (Taipeibank) had expressly rejected any changes initiated by the Respondent.

An Irrevocable Letter of Credit "can neither be amended nor canceled without the agreement of all parties thereto." UCP Art.3(c).

2. The clause in "Amendment No. 9" conditioning payment on receipt of funds from another bank constitutes a "soft confirmation", which the ICC Banking Commission states is not provided for by the UCP.

...such a credit could not be considered to be an irrevocable credit in the terms of Art. 3(c), because one party can cancel the credit without the consent of the beneficiary in the event of such third party reimbursement not being forthcoming. Further

any "confirmation" of such credit is not, therefore, the confirmation envisaged in UCP Art. 3(b). Opinions of the ICC Banking Commission (1980-81),p13.

In the Court of Appeals, Petitioner presented its legal theory that estoppel and waiver apply to this case:

a - that Respondent is estopped from claiming late shipment as a reason for non-payment on the Credit because it was the cause for the delay,

b - that UKB as the negotiating bank waived any discrepancies in the documents when it accepted and reviewed them (at the time of the 1st tender).

Since UKB acted as the negotiator, and it made a document examination on or about July 10, 1981, and did not itself object, the fact that another bank did refuse to accept the documents after the expiry date has no effect on the Petitioner's right to

payment. There is little evidence, and the district court does not make any findings in regard to the character of these claimed discrepancies.

"However", the Court of Appeals stated in its May 1 decision, "appellant's argument assumes that UKB acted as a negotiator of the letter of credit when in fact it did not."

Despite the District Court's contentions, it is curious that Respondent had no obligation in this regard with these undefined "parallel obligations" of confirmation hovering about, and the fact that Respondent had taken the $2,000 "confirmation fee".

The Sixth Circuit Court of Appeals evidently did not consider as a "genuine issue of material fact" Respondent role in:

a) causing the carrier to relinquish its contract with coresponding losses,

b) thwarting the Beneficiary's ability to meet the shipping date, and thus creating an obstacle to his obtaining payment under the letter of credit.

Under the summary judgment standard, the possibility of tortious misrepresentation or negligence, which ultimately led to the very delays complained of and used as exculpatory means to avoid liability are too great to be dismissed summarily. The Court is reminded that a mere possibility of the facts being determined in some manner that would tip the scales differently on this question, i.e. should the letter of credit have been honored, would rule out summary judgment and require reversal of the decision.

A key issue upon which this controversy hinges, and a subsidiary question which the Petitioner asks this Court to consider, is that of the obligation of a confirming bank

to take appropriate action in furtherance of the beneficiary's interest insofar as they relate to the bank's confirmation; and does the confirming bank have a correlative obligation to the issuing bank and holders of assignments of proceeds against the letter of credit?

The vessel EASTERN HORNET had been chartered through Cerbere & Co., London, to transport the coal to Taiwan; Cerbere had accepted an assignment of proceeds as payment for the freight charges. In late June of 1981, Cerbere merely sought to have Respondent authenticate the confirmation of the Credit from which its assignment of proceeds was to be derived. This authentication was to be key test telexed to its bank, Banco Uriquijo, Madrid, Spain.

Instead of a key-tested confirmation of the Credit to its bank as requested, Respondent sent a telex to Cerbere, the charterer

stating that "No proceeds can be distributed until they are received in our bank.

1. The Beneficiary of the L/C had not requested Respondent to confirm the Credit, but because of the bank's actions in interjecting itself into the situation it was fait accompli.

2. Respondent's reply message to the offices of Cerbere, rather than to its bank, Banco Uriquijo, was not in accordance with instructions. Owners of vessels will never bring their ships into foreign ports unless their banks have been advised of the confirmation of credit.

The Petitioner argues that the conclusive cause of this muddled state of affairs impairing commerce was caused by the aberrational Amendment No. 9 and Respondent's flaunting of the rules for letters of credit established to facilitate international trade.

Petitioner has argued before the lower courts that it was unjustly precluded from meeting the shipping date, and that Respondent's conduct in this matter was the proximate cause.

Request for authentication of the Credit was not on behalf of Petitioner but for the above explained purposes of the Charterer, Cerbere & Comp.

The District Court erred in taking the view that there was no particular "duty" on the part of Respondent to "send telexes" on behalf of Petitioner, and refers to a "misunderstanding" or error in transmission.

However, the record discloses that the only "misunderstanding" was that the carrier's Banco Uriquijo sought to obtain verification that the Credit had been confirmed. (The requirement and procedure for key testing are discussed in the Petition for Rehearing, page 7.).

Even if it could be argued that no form of contractual arrangement existed between Respondent and Petitioner that would give rise to a duty, such argument is clearly undermined by the Court's finding (page 6 of the Opinion) that Respondent "contacted" Cerbere and spoke to them about the credit situation. This definitely amounts to some degree of undertaking of responsibility in this connection.

Financial messages exchanged telegraphically between banks both authorize and advise of activity in the demand deposit accounts of the various parties to an international payment transaction. Obviously security is a key issue in the exchange of these financial messages, and banks have devised system of authenticating messages to make sure that the person giving the payment instruction is in fact authorized to do so. Each cable or telex containing instruc-

tions to pay out money must have a special code called a test key. The test key serves the same function as does the bank's signature on a cashier's check (see KINGMAN et al., 1986, p.44). With the disputed testimony and interpretation about the meaning and inferences concerning the unilateral amendment of a letter of credit, violations of the UCP, the identity of the negotiating bank and its responsibilities, the timeliness of presentation of documents, and the conduct of Respondent, especially in regard to the Cerbere affair - it is inconceivable that a Federal Court can find conclusively that there exist no genuine issues as to material fact requiring submission to a jury. If anything, it should be through the chain of events and the evidence produced by the Petitioner, which point toward the essential soundness of Petitioner's Case.

The Courts, by their decisions in this

case, have embarked on a new path in which we can forsee the decline and fall of the significance of "Documentary Evidence" as a factor in adjudicating legal confrontations.

Mr. Hassanain, UKB's VP testified that his bank did not act as a negotiating bank, nor did he engage in such similar activity for UKB. The District Court in its decision, and the Court of Appeals in its decision and oral arguments sided with his unsupported testimony, in spite of documentary evidence to the contrary, presented by Petitioner.

Has Petitioner really violated Mr. Hassanain's rights by confronting him with a flury of documentary evidence which totally belie his statements?

Not so ! - Facts proved by a document or a duly authenticated copy thereof are "documentary evidence", and "are not objectionable as violative of an accused's alleged constitutional rights to be confronted by

the witnesses against him." (People v. Purcell, 22 Cal.App.2d 126.).

THE CURRENT CASE LAW

A well reasoned series of decisions showing Petitioner has satisfied the fundamental requirements of a negotiating bank, and cases showing that banks deal in documents, not goods - and thus are precluded from interfering in underlying negotiations between buyer and seller are presented. Other cases concerning modification of letters of credit by unauthorized parties are also presented:

COMMERCIAL BANK v. GOTHAM ORIGINALS, 486 NYS2d 715 (CT APP 1985)

The bank was originally designated an advising bank, it became a negotiating bank by purchasing signed drafts drawn under the letter of credit by the transferee beneficiary.

UNITED BANK LIMITED v. CAMBRIDGE SPORTING

GOODS CORP., 41 NY2d 254, 360 N.E 2d 943 (1976).

Banks deal in documents and not in goods and are not responsible for any breach of warranty or non-conformity of the goods involved in the underlying sales contract.

M.J.SALES & DISTRIBUTING CO., INC., (bankruptcy) 25 B.R. 608(1982).

A bank pays with its own funds, and not from assets belonging to debtor who caused the L/C of credit to be used.

BANCO NATIONAL DE DESAROLLA v. MELLON BANK, N.A., CIV. A No. 82- 0938, US District Court, Western District, Virginia (Mar. 11,1983).

When there is no evidence that the Beneficiary explicitly consented to modification of letter of credit by amendment, notice of provisions of amendment was ineffective.

S.A. v. TRADE BANK & TRUST, 21 A.D.2d 187, 249 NYS2d 557, 16 NY2d 698, 209 N.E2d

551(1965).

Letter of credit complied in timely fashion but was unjustifiably prevented from doing so.

LUSTRELON, INC. v. PRUTACHER, 178 N.J. Super. 128, 482 A2d 518(App Div 1981) U.C.C 1-201-(19) official comment (1977)

Good faith is defined as honesty.

WERNER v. A.L.GROOTEMAAT & SONS, 259 N.W.2d 310,315 n.22.(1977)

It appears to the Court ... that the bank had acted in its own interest in accepting an assignment of the proceeds of the Credit. Therefore, in light of said assignment, the advising bank became in essence the beneficiary of the letter of credit.

PUBALI BANK v. CITY NATIONAL BANK, 676 F2d 1326(1982)

... the bank [acted] first as an advising bank or correspondent to the overseas issuing bank, and second as "lender cre-

ditor" of the beneficiary. The Court allowed the direct action by reasoning that the bank could not hide behind the cloak of a neutral advising bank. The court stated that it was holding the bank jointly liable because it had acted in its own self-interest.

BANK OF AMERICA v. WHITNEY-CENTRAL NATIONAL BANK,(5th Cir)291 F 929

...the L/C as an instrument for financing trade is the primary consideration. Any other rule would destroy the effectiveness of this valuable commercial device. The Court cannot impose any condition which is not contained in the letter of credit.

ASBURY PARK & OCEAN GROVE BANK v. NATIONAL CITY BANK, 35 N.Y.S2d 985

This case presents a question somewhat different from that found in the cases cited. The Supreme Court was not authorized to impose any condition not contained in a letter of credit.

PETITIONER'S CLAIM FOR DAMAGES

Petitioner was a new company at the time of the transaction. Its initial contract was with China Rebar, November 19, 1980, for the supply of steam coal, which was quickly followed by Petitioner's contract with Lucky Cement on January 30, 1981. This one called for an earlier shipping schedule then China Rebar. Later, on July 6, 1981 Petitioner and Union Far East Corp. of San Francisco, agent for Thailand Power Company, a Thai Government Agency, entered into another steam coal supply contract [1],[2].

Petitioner was in the enviable position of shipping on three contracts when Respondent wrongfully sabotaged the Lucky Cement contract at the last possible moment by breaking its contractual duties as confirmation bank. This action asphyxied not only the Lucky Cement contract but the two other

contracts as well, as the purchasers naturally became skeptical over Petitioner's capability to ship, particularly in view of the fact that Petitioner was a new, yet 'un-proven' company.

The Petitioner's signed steam coal contracts provided for a total shipment through the year 1986 for a maximum of 1,525,000 Metric Tons with an option at the end of 1986 to extend steam coal contract for 3,325,000 through the year of 1991.

Thus, Respondent's actions totally and forever destroyed Petitioner as a business entity. As result of this transaction Petitioner lost all three contracts. During the Year 1983 twenty different persons as suppliers for these coal contracts gave deposition consisting of a total of over 6,300 pages transcribed. In addition, two other deposers gave video-taped and audio-taped depositions in Athens, Greece, consisting of

about 10 hours of taped transcripts.

Petitioner's claimed damages are for lost profits on these three contracts, proof of which is submitted in Petitioner's "Feister Affidavit" [3]. The amount of damages for breach of contract is established by the Kentucky Law [4] standards for the Calculation of Lost Profits: Net Profits in particular [5], and Lost Profits of a New Business [6].

Petitioner claims damages against Respondent in amount of $11,312,416.22.

---

[1] see docket NR-239: (photocopies of these contracts are identified as attachments A,B, C) dated Nov.25,1986, attached as Exhibit 27.

[2] see docket NR-124: President of Union Far East, Deposition, dated June 30, 1983.

[3] 25-C.J.S. Damages 42. pp. 735-736.

[4] HENDERSON v. NAT'L FIDEL.LIFE INS. CO, 257 F2d-917, 919 (10th Cir., 1958).

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[5] KELLERMAN v. PEDMAN, Ky, 411 S.W.2d 315 (1967); KOPLIN v. KAULKNER, Ky, 239 S.W.2d 467 (1956); PAULINE'S CHICKEN VILLA, INC., v. KFC CORP., Ky, 701 S.W.2d 399 (1985).

CONCLUSION

The issues herein are transcending the interests of the parties involved. A proper resolution is mandatory for all entities interacting financially with domestic or foreign establishments through letters of credit, including the United States Government and the international banking community. It is now up to the United States Supreme Court to determine the reach of the respective laws for letters of credit.

For these reasons, a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

OCT 0 8 1990

JAMES K. O'GALLAGHER
ATTORNEY AT LAW
55 NEW MONTGOMERY ST., STE. 300
SAN FRANCISCO, CA 94105

90-613

APPENDIX

Supreme Court, U.S.
FILED
SEP 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court
of the
United States

OCTOBER TERM, 1990

No.

BLACK CRYSTAL COMPANY, INC.,
Petitioner

V

FIRST NATIONAL BANK OF
LOUISVILLE
Respondent

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

JAMES K. O'GALLAGHER
55 NEW MONTGOMERY STREET, # 306
SAN FRANCISCO, CA 94105
(415) 243-0573
ATTORNEY FOR PETITIONER

APPENDIX

TABLE OF CONTENTS

A Opinion of United States Court of Appeals (Sixth Circuit) dated May 1, 1990

B Opinion of United States District Court Western District of KY dated 5/11/89

C ORDER of United States Court of Appeals (6th Circuit) dated June 15, 1990

D-1 Draft from UKB to FNB(Respondent(dtd 7/11/81

D-(2-5) Assignments of Proceeds/Drafts from Black Crystal Company, Inc to Various Assgignees

E Telex dated July 15, 1981 from Taipeibank to FNB(Respondent)

APPENDIX A

NOT FOR PUBLICATION

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited a copy must be served on other parties and the Court. This notice is to be p r o m i n e n t l y displayed if this decision is reproduced.

No. 88-5650

F I L E D

UNITED STATES COURT OF APPEALS

MAY-1 1990

FOR THE SIXTH CIRCUIT

LEONARD GREEN

Clerk

TRANSPORTATION MANAGEMENT & CONSULTING, INCORPORATED;
LANDAF SHIPPING LIMITED;
POLYKYN NAVIGATION,

Plaintiffs,

v.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

BLACK CRYSTAL COMPANY, INC.,

Defendant, Third Party-Plaintiff, Appellant,

UNITED KENTUCKY BANK; YOUSSEF ALI HASSANIAN;

Defendants,

FIRST NATIONAL BANK OF LOUISVILLE,

Third Party-
Defendant, Appellee.

BEFORE: KENNEDY and RYAN, Circuit Judges; and SMITH, District Judge.*

---

* The Honorable George C. Smith, United States District Judge for the Southern District of Ohio, sitting by designation.

RYAN, Circuit Judge. Third-party plaintiff-appellant, Black Crystal Company, Inc. ("Black Crystal"), appeals the district court order granting summary judgment for third-party defendant-appellee First National Bank of Louisville ("First National") in this action involving the issuance and non-payment of a commercial letter of credit ("the Credit").

Because the record reveals no genuine issue of a material fact, the district court correctly granted summary judgment for appellee First National. Thus, we affirm the district court's judgment.

I.

This case involves a commercial letter of credit issued by the City Bank of Taipei. The beneficiary was identified in the letter of credit as "Black Crystal

Company, Inc., Export Division." The Credit also identified United Kentucky Bank as the advising bank. First National was the confirming bank. Although the Credit did not specify a negotiating bank, appellant contends that United Kentucky Bank acted as one. Appellee disputes that contention.

Black Crystal claims that First National was liable for payment under the Credit and that First National wrongfully refused to pay. Appellant raised the following issues on appeal:

1. Whether the Beneficiary did meet the expiration date of July 10, 1981 so as to be in a position to demand payment under the letter of credit.

2. Whether the Beneficiary presented the documents to a bank in a position to accept the documents and accept

responsibility as a negotiating bank.

3. Whether the Beneficiary did fulfill the terms and conditions of the letter of credit.

4. Whether the dishonor of the letter by the bank which had undertaken to confirm, FIRST NATIONAL BANK, was wrongful.

5. Whether the dishonor was entirely the fault of FIRST NATIONAL BANK, or whether other parties, including UNITED KENTUCKY BANK, BANK OF CALIFORNIA INTERNATIONAL etc. shared some responsibility.

6. What was the effect of "Amendment 9", i.e. was it a true amendment?

7. Was "Amendment 9" wrongful in itself, and the result of negligence or deliberate interference with the transaction?

8. Given the conflicts of the testimony and interpretations of factual developments in the case, was summary judgment a proper remedy?

II.

A court deciding a motion for summary judgment must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

> "[O]n a motion for summary judgment the movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to

the party opposing the motion." Blakeman v. Mead Containers, 779 F.2d 1146, 1150 (6th Cir. 1985), quoting Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979).

Appellant argues that summary judgment was inappropriate in this case because "the facts are immensely in dispute." Appellant claims that it timely submitted the documents required by the Credit to United Kentucky Bank, a bank claimed by appellant to be a negotiating bank. The record does not support appellant's claims.

After carefully examining the record, we conclude that summary judgment for appellee was appropriate because there is no genuine issue as to the material fact.

Finally, appellant argues that the District Court erred in failing to consi-

der the application of appellant's waiver and estoppel theories. Appellant contends that because the United Kentucky Bank did not notify Black Crystal of any problems when the documents were presented to and accepted by Hassanian on July 10, the fact that First National refused to accept them after the expiry date can have no effect on Black Crystal's right to payment. However, appellant's argument assumes that United Kentucky Bank acted as a negotiator of the letter of credit when in fact it did not. The undisputed testimony of the Kentucky Bank's officer, who was responsible for dealing with Black Crystal's affairs, was that at no time did United Kentucky Bank negotiate the letter of credit.

For the reasons fully detailed by the district court in its well-written opinion which we fully adopt as though it were our own, we AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

LOUISVILLE DIVISION

TRANSPORTATION MANAGEMENT
& CONSULTING, INC., et al.,

PLAINTIFFS,

v.

CIVIL ACTION
No.
82-350L(J)

BLACK CRYSTAL CO., INC.
et al.,

DEFENDANTS.

ORDER OF SUMMARY JUDGMENT

In accordance with the Memorandum Opinion this date entered, First National Bank of Louisville's Motion for Summary Judgment IS GRANTED. Black Crystal's Motion for Summary Judgment IS DENIED and its claims against First National Bank of Louisville are DISMISSED WITH PREJUDICE.

All other claims in this action have been resolved previously. The clerk shall STRIKE THIS ACTION FROM THE DOCKET.

This is a final and appealable order.

DATED 5-11-88

SIGNED

Edward H Johnstone, Chief Judge

United States District Court

E N T E R E D

MAY 10 1988

JESSE W CRIDER,CLERK
BY (SIGNED)
DEPUTY CLERK

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

LOUISVILLE DIVISION

TRANSPORTATION MANAGEMENT & CONSULTING, INC., et al.,

PLAINTIFFS,

v. (CIVIL ACTION (No.82-350L(J)

BLACK CRYSTAL CO., INC. et al.,

DEFENDANTS.

MEMORANDUM OPINION

This case presents the court with a veritable Augean stable of questions concerning the issuance and payment of a letter of credit issued as part of a contract between Black Crystal Coal Company of San Francisco, California (hereinafter Black Crystal) and Lucky Cement Corporation, of Taiwan (hereinafter Lucky Cement). Before the court are First National Bank of Louisville's Motion for Summary Judgment on Black Crystal's Third Party Complaint and Black Crystal's Motion for Summary Judgment on its Third Party Complaint. Jurisdiction is proper under 28 U.S.C. 1332.

I.FACTS

On or about January 30, 1981, Lucky Cement Corporation of Taipei, Taiwan contracted with Black Crystal Coal Company

for the purchase and sale of more than 126,000 metric tons of steaming coal. The coal was to be shipped in five shipments of from 25,000 to 26,400 metric tons from the United States to Taiwan. As part of their agreement, Lucky Cement had an irrevocable, negotiable letter of credit (hereinafter referred to as the Credit) in the amount of $1,784,640.00 issued for the benefit of Black Crystal by the City Bank of Taipei (hereinafter Taipeibank).

On or about February 18, 1981 the Credit was sent by tested telex to First National Bank of Louisville in Louisville, Kentucky (hereinafter First National). The Credit expressly designated the Bank of California International as the reimbursing bank and the United Kentucky Bank (hereinafter UKB) as an advising bank, but did not designate a negotiating bank. The final shipping date set forth was

March 9, 1981 and the expiration date was March 29, 1981. The Credit provided for payment of drafts if accompanied by certain commercial invoices, Ocean Bills of Lading, an Order of the City Bank of Taipei, a Certificate of Origin, a Certificate of Inspection Analysis and Weight, a Certificate from the beneficiary, and an Original Suppliers Certificate. As a final matter, the telex stated that it was "subject to" the Uniform Customs and Practices for Documentary Credits, International Chamber of Commerce Publication 290 (hereinafter abbreviated UCP). [1].

---

[1] The Credit telex provided as follows:

FIRST NATIONAL BANK OF LOUISVILLE

LOUISVILLE,KENTUCKY USA

TEST:_____

PLS ADVISE THRU UNITED KENTUCKY BANK LOUISVILLE

WE OPEN IRREVOCABLE CREDIT OTH2/00792

/UO

BENEFICIARY BLACK CRYSTAL COMPANY

INC.EXPORT DIV

1144 CLAY STREET

SAN FRANCISCO CALIF 94100 USA

ACCOUNTEE LUCKY CEMENT CORP 8TH FL

95 SHIN LIN FU-KUO RD

TAIPEI TAIWAN REPUBLIC OF CHINA

AMOUNT USDLS$1,784,640.00

COVERING 26,400 MT AMERICAN STEAMING

COAL IN BULK AT SELLER'S

OPTION,AT USDLS67.60 PER METRIC TON

CANDF SUAO FREE OUT

LATEST SHIPPING MAR 19 1981 EXPIRY

MAR 29 1981

SHIPMENT FROM NEW ORLEANS TO SUAO

PARTIAL SHIPMENTS ALLOWED TRANSHIP-

MENT PROHIBITED

AVAILABLE AGAINST BENEFICIARY'S

DRAFT(S)DRAWN ON US AT 180DAYS

AFTER SIGHT FOR FULL INVOICE COST

ACCOMPANIED BY THE FOLLOWING DOCTS:

SIGNED COMMERCIAL INVOICE IN QUIN-

TUPLICATE INDICATING IMPORT PERMIT

NO.69RCI-008859B

FULL SET OF CLEAN ON BOARD OCEAN

BILLS OF LADING MADE OUT TO

THE ORDER OF CITY BANK OF TAIPEI-

TAIPEI MARKED FREIGHT PREPAID

NOTIFY BUYER

CERTIFICATE OF ORIGIN IN TRIPLICATE

ISSUED BY GOVERNMENTAL AUTHORITY

THE CERTIFICATE OF INSPECTION

ANALYSIS AND WEIGHT IN QUINTUPLICATE

ISSUED BY COMMERCIAL TESTING CO

BENEFICIARY'S CERTIFICATE STATING

THAT DUPLICATE SET OF THE ABOVE DOCU-

MENTS HAS BEEN AIRMAILED BY REGISTE-

RED EXPRESS MAIL

DIRECTLY TO THE BUYER BY BENEFICIARY

WITHIN 3 DAYS AFTER THE SHIPMENT IS

EFFECTED

ONE ORIGINAL SUPPLIERS CERTIFICATE

(BLANK FORM AIRMAILING)

ALL BANKING CHARGES OUTSIDE TAIWAN

ARE FOR A/C BENEFICIARY

THE USANCE DRAFT(S)DRAWN HEREUNDER

ARE NEGOTIABLE ON A SIGHT BASIS WITH

DISCOUNT CHARGES AND ACCEPTANCE

COMMISSIONS FOR

BUYER'S A/C

SPECIAL INSTRUCTIONS:

1)CHARTER PARTY D/L IS ACCEPTABLE

2)T/T REIMBURSEMENT CERTIFYING

COMPLIANCE IS ACCEPTABLE

3)WITHIN 10DAYS AFTER RECEIPT OF THIS

L/C ADVICE,BENEFICIARY MUST ESTABLISH

A LETTER OF GUARANTEE OR STAND-BY L/C

FOR USDLS 53,460.00 VIA ADVISING BANK

AS PERFORMANCE BOND TO CITY BANK OF

TAIPEI TAIPEI THIS L/C OR L/G SHALL

BE RELEASED WITHOUT INTEREST AFTER

THE CONTRACTED COMMODITY HAS ARRIVED IN TAIWAN AND HAS BEEN FOUND TO BE IN ACCEPTABLE CONDITION AND SELLER'S PAYMENT MADE TO THE BUYER OF DESPATCH MONEY AND PENALTY WHICH WILL BE NOTICED BY BUYER THROUGH THE ISSUING BANK

TO THE NEGOTIATING BANK ONLY:UPON NEGOTIATION OF THE DRAFT DRAWN UNDER THIS CREDIT PLS CABLE US OF THE AMOUNT NEGOTIATED FOR REIMBURSEMENT, PLS DRAW AT SIGHT ON THE BANK OF CALIF INTL NEW YORK FOR THE FACE AMOUNT OF THE DRAFT UPON NEGOTIATION CERTIFYING IN COMPLIANCE WITH THE CREDIT TERMS AND CONDITIONS ALL DOCUMENTS ARE TO BE DESPATCHED IN TWO SETS BY CONSECUTIVE AIRMAILS TO THE ISSUING BANK WE UNDERTAKE THAT DRAFTS DRAWN AND PRESENTED IN CONFORMITY WITH THE

TERMS OF THIS CREDIT WILL BE DULY HONORED SUBJECT TO UCP FOR DOCUMENTARY CREDIT (1974 REVISION) INTL CHAMBER OF COMMERCE BROCHURE NO 290

TAIPEIBANK

After the Credit was opened, Black Crystal used it to finance the mining, trucking, testing and transportation of the coal called for in the Lucky Cement /Black Crystal contract by assigning rights to proceeds from the Credit to the various mining, trucking and barging companies involved. Despite Black Crystal's efforts and arrangements however, it was unable to meet the March 1981 contract dates. Accordingly, Black Crystal requested and received four extensions of its performance dates and four corresponding extensions of the Credit's shipping and expiration dates in Amendments 6, 7, 8, and 10 to the Credit. Under the terms of

Amendment 10, the shipping date was extended to June 30, 1981 and the Credit's expiration date was extended to July 10, 1981.

At some point, Black Crystal found it desirable or necessary to have its Credit confirmed by another bank. To this end, on May 25, 1981, Black Crystal sent a telex to First National asking First National to notify Taipeibank that Black Crystal wanted the Credit confirmed. First National sent a telex on behalf of Black Crystal to Taipeibank reciting Black Crystal's request. Two days later, on May 27, 1981, First National, on its behalf, sent another telex to Taipeibank requesting authorization to confirm. The First National telex stated in part

> Please authorize us by tested telex to confirm this letter of credit. Also please amend L/C to read 'avai-

lable against beneficiary's draft(s) drawn on First National Bank of Louisville, Kentucky at 180 days after sight for full invoice cost."

On May 28, 1981 Taipeibank, by telex, agreed to a confirmation of the Credit and authorized First National to confirm, but stated that "all other terms and conditions remain unchanged."

On May 29, 1981, First National confirmed the Credit in Amendment 9. In that Amendment First National stated:

> We confirm this Credit and thereby undertake that all drafts drawn and presented to First National Bank of Louisville by United Kentucky Bank, International Dept., P.O.Box 34000, Louisville, Kentucky 40232, on behalf of the beneficiary of this Credit in conformity with the terms of this Credit will be duly honored

by First National of Louisville if all terms and conditions of this Credit have been met and as soon as First National Bank of Louisville has been reimbursed by the Bank of California International, New York for face amount of the draft in available funds. First National Bank of Louisville will then paid (sic.) in available funds to United Kentucky Bank the amount of any drawing less First National Bank of Louisville's fee for United Kentucky Bank to disburse proceeds to the beneficiary and/or their assignees if any.

This amendment was signed by representatives of UKB and Black Crystal.

The same day that First National confirmed the Credit, the first shipment of coal mined for the Black Crystal/Lucky Cement contract was beginning to be loaded

on river barges at the Lyon County Coal Terminal in Kentucky. All did not go smoothly. There was some dispute with the Lyon County Coal Terminal concerning payment of terminal charges and loading was delayed. On June 10, after approximately 6 barges had been loaded, Black Crystal transferred loading operations to Reid Quarry, where the remainder of the coal was loaded on 10 more barges and all 16 were sent downstream to New Orleans, Louisiana. The 16 barges of coal arrived in New Orleans for mid-stream stevedoring and loading to vessel around June 23, 1981.

At some point prior to the coal's arrival in New Orleans, Black Crystal entered negotiations with Cerbere & Co., Ltd. (hereinafter Cerbere) for ocean transportation of the coal to Suao, Taiwan on board the ship EASTERN HORNET.

Cerbere agreed to ship the coal and to accept an assignment of proceeds for ocean freight charges, provided a proper key tested telex was sent from a confirming bank to Cerbere's bank, Banco Urquijo, authenticating Black Crystal's Credit. Apparently Black Crystal asked First National to send an authenticating telex to Banco Urquijo, but no such telex was sent. Thereafter, in late June, 1981, Cerbere threatened to cancel its arrangement with Black Crystal because no telex had been sent to Banco Urquijo. Cerbere gave Black Crystal until June 29, 1981 to send a telex.

On June 29, 1981, First National contacted Cerbere concerning Black Crystal's credit. Evidently there was some difficulty, misunderstanding or disagreement between Cerbere and First National because First National apparently never

sent the requested telex to Banco Urquijo. Black Crystal alleges that as a direct consequence to First National's actions, charter party negotiations between Black Crystal and Cerbere ended on June 29, 1981. After the break up of negotiations with Cerbere, Black Crystal arranged transportation of the coal by spot chartering the ship SAN NICHOLAS from Anteres Shipping and Trading Corporation. The Charter Party agreement for the transportation of the coal aboard the SAN NICHOLAS was signed in San Francisco on June 30, 1981.

On July 9 and 19, 1981, the coal was loaded aboard the SAN NICHOLAS. Youseff Ali Hassanian (Hassanian), an officer of UKB from Louisville, Kentucky, was in New Orleans to observe the loading and to receive the bills of lading and other documents relating to the coal. After

the coal was loaded on board the SAN NICHOLAS, Hassanian took the bills of lading and other documents and returned to Louisville. He testified at a deposition that when he returned to Louisville from New Orleans, he had all the documents that were required to be used in the negotiation of the Credit.

Black Crystal claims that thereafter, on July 12 and 13, 1981, Hassanian prepared and mailed two sets of the documents required by the Credit to Taipeibank and First National. In these mailings Hassanian allegedly certified that he had all the documents in satisfaction of the Credit's terms and conditions and requested payment be wired to UKB. First National disputes this, and claims that neither the documents required by the Credit nor a draft drawn on the Credit was ever actually presented to First National for pay-

ment. In any case, on July 13, 1981, a First National representative told Hassanian that no extension to the Credit's expiration date had been received and that the Credit had expired on July 10. First National refused to honor UKB's draft and never paid any draft drawn on the Credit.

On July 17,1981 the Bank of California received a telex from Taipeibank instructing the Bank of California not to pay any reimbursement requested under the Credit. The telex went on to state that payment should be made "only at receipt of our further instructions." On July 20, 1981 the Bank of California received another telex from Taipeibank requesting that the Bank of California confirm receipt of the July 17 message and asking the Bank of California whether it had paid under the Credit. The Bank of

California responded by telex that it had not received a reimbursement claim to that time and that it would inform Taipei bank upon receiving a demand and before paying.

On July 27, 1981 representatives of UKB and Black Crystal visited the New York office of the Bank of California and delivered documents intended to be in satisfaction of the terms and conditions of the Credit. The Bank of California examined the documents, found discrepan-cies, and refused to pay. A Black Crystal representative returned to the Bank of California's offices on July 28, 1981 with proposed amendments, but the Bank of California still refused to pay. The Bank of California sent a telex to UKB on July 29, 1981 enumerating the discrepancies in the documents and calling attention to the instructions from Taipeibank not to pay.

The Bank of California was never authorized to and never made any payment under the Credit.

Meanwhile, the coal which was loaded on board the SAN NICHOLAS in New Orleans had been transported across the ocean to a point off the coast of Taiwan. Once there however, the coal was not unloaded. Allegedly the ocean shippers refused to unload the coal until they were paid. Since payment was not forthcoming, they apparently disposed of the coal at a port in Korea.

In 1982 the inland and oceangoing shippers of the coal instituted this suit against Black Crystal and UKB. Black Crystal filed a Third Party Complaint against First National.

II. NATURE OF THE TRANSACTION

The court must begin analysis of this matter by noting some uncertainty about

the legal nature of the transactions and relationships at issue here. Some authorities view letters of credit arrangements as something separate from the traditional contract. See, e.g., Voest-Alpine Intern. Corp. v. Chase Manhattan Bank, 707 F.2d 680,682-83 (2dCir. 1983); Bank of Cochin Ltd. v. Manufacturers Hanover Trust, 612 F.Supp.1533,1537 (S.D.N.Y.1985), aff'd, 808 F.2d 209 (2d Cir. 1986); J. WHITE AND R. SUMMERS, UNIFORM COMMERCIAL CODE 5.53 at 103 (1977). Other authorities have viewed letters of credit as executory unilateral contracts, to which general contract principles are applicable. See, e.g., Union Planters National Bank v. World Energy Systems, 816 F.2d 1092, 1098 (6th Cic. 1987); Bank of North Carolina, N.N. v. Rock Island Bank, 570 F.2d 202, 207 (7th Cir. 1978); Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461,465-66

(2d Cir. 1970); Transparent Products v. Paysaver Credit Union, 198 U.S. Dist. LEXIS 605 (N.D. Ill., Jan 21, 1988); Worldwide Sugar Co. v. Royal Bank of Canada, 609 F.Supp. 19,23-24 (S.D.N.Y. 1984); Consolidated Aluminum Corp. v. Bank of Virginia, 544 F.Supp. 386,395 (D.Md. 1982), aff'd, 704 F.2d 136 (2d Cir. 1983).

Regardless of the legal description of the parties' relationships in this case, this court is bound to apply the terms of the letter of credit as it was agreed to by the parties. Consequently, the court must refrain from injecting its own views into the parties' agreements or from remaking the agreements which they have freely entered. With these general principles in mind the court will consider the rights and obligations of the parties under the Credit, under First

National's confirmation of the Credit, under Article 41 of the UCP, and under UKB's negotiation of the Credit.

III. RIGHTS AND OBLIGATIONS UNDER THE CREDIT

The Credit in this case was issued on or about February 18, 1981 by Taipeibank on behalf of its customer, Lucky Cement. The Credit expressly stated that it was "subject to" the UCP. Black Crystal argues that this provision precludes the application of Article 5 of the Uniform Commercial Code [2] (hereinafter the UCC) to the parties' relationship. First National disagrees. Because there is little or no substantive difference between the rights and obligations imposed

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[2] Article 5 of the Uniform Commercial Code is enacted in Kentucky as KY.REV.STAT. 355.5-101 et seq.

imposed by the UCC and the UCP to the relationships considered here, the court need not choose between the UCC and the UCP to resolve this matter.

A letter of credit is purely a transaction in documents. See Banco Nacional de Desarrollo v. Mellon Bank, N.A., 726 F.2d 87,91 (3d Cir. 1984); Chase Manhattan Bank v. Equibank, 550 F.2d 882,885 (3d Cir. 1977); Courtaulds North America, Inc. v. North Carolina National Bank, 528 F.2d 802,805-6 (4th Cir. 1975); UCP Art. 8(a). In the typical letter of credit transaction an issuing bank draws a letter of credit in favor of a beneficiary for the payment of money upon presentation of certain documents prepared for the issuing bank's customer pursuant to a contract between the customer and the beneficiary. See KY.REV.STAT. 355.5-103(1)(a); UCP General Provisions

and Definitions b. In essence therefore, a letter of credit is an engagement by the issuing bank for the purchase of the documents specified in the letter of credit. See Equibank, supra at 885.

In such an arrangement the issuing bank has the obligation to pay o n l y upon a presentation made in accord with the terms of the letter of credit. See Union Planters National Bank v. World Energy Systems, 816 F.2d 1092,1098 (6th Cir. 1987); KY. REV. STAT. 355.5-114(1); UCP Art. 3(a). Upon proper presentation, the beneficiary has the right to collect payment from the issuing bank and the issuing bank has the corresponding right to collect from its customer any sums paid under the credit. See KY. REV. STAT. 355.5-114(3). Before the issuing bank may pay or the beneficiary collect, the issuing bank has the duty to ensure that the

presentation strictly conforms to the terms of the letter of credit. [3]. See KY.REV.STAT.355.5-109(2); UCP Art. 7. In the absence of strict conformity, the bene-ficiary cannot force payment and the

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[3] Whether a letter of credit beneficiary is held to a standard of strict compliance is a matter of local law. Tosco Corp. v. FDIC, 723 F.2d 1241 (6th Cir. 1983). Nothing in the UCC or the UCP indicates that the strict compliance rule should not be followed in letters of credit "subject to" the UCP.

Although there is no Kentucky case law on this point, Kentucky would probably follow the majority rule requiring strict compliance with the terms of a letter of credit. Cf.UTICA Mut.Ins. Co. v. Walker, 725 S.W.2d 24,26 (Ky.Ct.App,1987) (applying New York law).

bank pays at its peril. See Equibank, supra at 886. In the case of the documents required by the letter of credit, this means the issuing bank has the right to examine them to "ascertain that on their face they appear to comply with the terms of the credit". KY. REV. STAT. 355.5-109(2); accord UCP Arts. 7 and 8. If the documents do not strictly comply with the terms and conditions contained in the letter of credit, an issuing bank is not required to pay the draft presented. See Board of Trade of San Francisco v. Swiss Credit Bank, 728 F.2d 1241,1243 (9th Cir. 1984); Banco Nacional de Desarrollo v. Mellon Bank, N.A., 726 F.2d 87, 91 (3d Cir. 1984); Voest-Alpine Intern. Corp. v. Chase Manhattan Bank, 707 F.2d 680, 682-83 (2d Cir. 1983); Courtaulds North America, Inc. v. North Carolina National Bank, 528 F.2d 802,

805-06 (4th Cir. 1975); Venizelos, S.A. v. Chase Manhattan Bank, 425 F.2d 461, 464-65 (2d Cir. 1970).

The issuing bank also has the right to insist that a beneficiary strictly comply with any time restrictions in the letter of credit. The time restrictions placed upon the beneficiary are perhaps the most important and material requirements affecting the parties' rights since they fix with certainty the liability of the issuing bank. See Consolidated Aluminum Corp. v. Bank of Virginia, 544 F.Supp.386,397 (D.Md. 1982), aff'd, 704 F.2d 136 (2d Cir. 1983); Bank of America National Trust and Savings Ass'n v. Liberty National Bank and Trust Co., 218 F.2d 831, 840-41 (10th Cir. 1955) ("[W]here a date is fixed in a letter of credit for its expiration, such provision becomes an important condition, and there

must be strict compliance with it before there can be liability on the part of a bank issuing the letter."). See also Cypress Bank v. Southwestern Bell Tel. Co., 610 S.W.2d 185,187 (Tex. Civ. App. 1980). Consequently the issuing bank has the right to insists that the beneficiary of a letter of credit present the required documents prior to the expiration of the letter of credit or demonstrate that he could have presented them in a timely fashion but was unjustifiably prevented from doing so. See Consolidated Aluminum, supra at 391-92; North American Foreign Trading Corp. v. General Electronics Ltd., 413 N.Y.S.2d 700, 26 U.C.C.R.S. 168, 171 (N.Y. App. Div.1979); see also KY. REV. STAT. 355.3-511; UCP Arts. 11 and 39. If the documents are not presented on time, the issuing bank's obligations end at the expiration date and

the issuing bank need not pay a draft on the letter of credit. See Consolidated Aluminum, supra at 387-98; Hyland Hills Metropolitan Park and Recreational District v. McCoy Enterprises, Inc., 554 P.2d 708, 20 U.C.C.R.S. 488,491 (Colo. Ct. App. 1976).

In this case the Credit was an engagement between Taipeibank (the issuing bank) and Black Crystal (the beneficiary), for the payment of money upon the proper presentation of certain documents (bill of lading, etc.) prepared at the behest of Lucky Cements (Taipeibank's customer) pursuant to the terms of the Lucky Cement /Black Crystal coal contract of January 30, 1981. In its position as issuing bank, Taipeibank had the right and obligation to inspect the documents presented and to require strict adherence to all the Credit's terms, including the expiration date.

IV. RIGHTS AND OBLIGATIONS UNDER THE CONFIRMATION

On May 29, 1981, pursuant to the request and authorization of Taipeibank, First National "confirmed" Black Crystal's Credit (hereinafter referred to as the Confirmation). In so doing, First National assumed the position of a "confirming bank" under both the UCC and the UCP.

A confirming bank "is a bank which engages either that it will itself honor a credit already issued by another bank or that such credit will be honored by the issuer or a third bank." KY.REV.STAT.355.5-103(1)(f); accord UCP Art. 3(b). Thus, a confirming bank essentially assumes the obligations of an issuing bank as to the Credit confirmed. See KY.REV.STAT.355.5-107(2) and comment; UCP Art. 3(b). [4].

[4] In the present case First National generally assumed the rights and duties of Taipeibank as to the Credit when it confirmed the Credit. Thus, as discussed above, First National had the duty to pay according to the Credit "provided that the terms and conditions of the Credit are complied with." See UCP Art.3(b); KY. REV.STAT.355.5-109. Additionally, First National, like Taipeibank, had the right and duty to examine all documents presented with reasonable care upon presentation to determine that they conformed to the conditions of the Credit. See Seattle - First Nat. Bank v. F.D.I.C.,619 F.SUPP. 1351,1362 (D.C.Ok.1985); KY.REV.STAT.355.5 -109 (2); UCP Art.7. Upon proper presentation and payment of a Credit draft, First National had the right to reimbursement from its customer, Taipeibank. KY. REV. STAT. 355.5-114(3).

However, the obligations that a confirming bank assumes need not exactly mirror the issuing bank's obligations under the letter of credit.

A confirmation is a separate engagement, independent from the letter of credit which it confirms. The obligations created by a confirmation are distinct from the issuing bank's obligations on the letter of credit. Consequently, the terms of a confirmation generally do not affect the obligations running between the issuing bank and the beneficiary - they merely add another, parallel set of obligations into the milieu. See UCP 3(b); KY.REV.STAT. 355.5-107(2), and comment. Both the UCC and the UCP allow parties to restrict these obligations and rights by agreement. See UCP General Provisions (a) [5]; KY.REV.STAT. 355.5-107(2) [6]. Such a restricted

confirmation is not necessarily an amendment of the letter of credit.

In the present case, First National confirmed Taipeibank's Credit in Amendment 9 thereto. The Confirmation contained terms and conditions slightly at variance with the original Credit. Specifically, the Confirmation stated that First National would pay under the Credit only

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[5] UCP General Principles and Definitions (a) states

> These provisions and definitions in the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

[6] Section 355.5-102(2) provides in pertinent part:

> A confirming bank...becomes directly obligated on the credit to the extent of its confirmation as though it were an issuer. KY.REV.STAT. 355.5-102(2) (emphasis added).

1) on payment of $2,000 of "confirmation fees", 2) on drafts presented by United Kentucky Bank, 3) on drafts in conformity with the terms of the Credit, and 4) upon reimbursement by the Bank of California International. These varying terms did not serve to alter the Credit, but created a separate, parallel obligation on the part of First National to pay, provided that the Confirmation's terms and conditions were met. The Confirmation was assented to by Bryan Perry (Perry), a Black Crystal vice president. Black Crystal now claims that Perry did not understand the Confirmation and that he did not have the authority to agree to the Confirmation on behalf of Black Crystal. See Black Crystal's Reply Memorandum in Support of its Motion for Summary Judgment against First National Bank at 17-19. Although this is a genuine dispute of

fact, it is not material to the resolution of this case.

If Perry were without authority to assent to the Confirmation, the Confirmation was presumably ineffective. If the Confirmation was ineffective, the First National Bank did not "confirm" the Credit within the meaning of the UCC and the UCP and was not obligated to pay according to the Confirmation. Therefore First National had no obligation to honor UKB's presentation of documents and demand for payment, whenever it was made. On the other hand, if Perry did have authority to assent then First National did "confirm" the Credit and was obliged to pay according to the Confirmation's terms. One of those terms was that all the terms and conditions of the Credit had to be met before First National would pay. First National had the right to insist that

this term be strictly complied with. The undisputed facts reveal however, that Black Crystal did not meet all of the terms of the Credit.

The Confirmation set June 30, 1981 as the final date for shipping the coal, and July 10, 1981 as the expiration date of the Credit. Black Crystal admits that the coal was not loaded for ocean shipping until June 9-10, 1981 and was shipped thereafter. Additionally, Black Crystal admits that it presented the documents and draft required by the Credit on or about July 13, 1981, three days after the Credit's expiration. Thus the coal was shipped and the presentment was made after the deadline set for each. Because Black Crystal did not meet either these deadlines, First National was within its rights in refusing to honor UKB's demand for payment.

Black Crystal implicitly argues that it was unjustifiably prevented from meeting the shipping and expiration dates in the Credit as a direct result of First National's failure to send an authenticating telex to Banco Urquijo. The court cannot agree. First National was under no obligation to send or receive telexes for or on behalf of Black Crystal. See KY.REV.STAT. 355.5-107(4); UCP Art. 10. Black Crystal offers no proof that First National ever promised to send such a telex. Therefore, First National was justifiably within its rights in failing or refusing to send such telex. Black Crystal offers no other proof that would justify its failure to meet the Credit dates, such as proof that First National maliciously or in bad faith failed to send the telex. See KY.REV.STAT. 355.5-109(1). In the absence of such evidence, First

National cannot be held liable for the problems between Black Crystal and its shippers which may have caused Black Crystal to miss the Credit deadlines. See KY.RE.STAT. 355.5- 109(1)(b).

V. RIGHTS UNDER UCP ARTICLE 41 AND THE TIME FOR PRESENTATION

Black Crystal alleges that UCP Art. 41 gave Black Crystal 21 days after July 10, 1981 to present documents and a draft. The court cannot agree. Article 41 provides:

> Notwithstanding the requirement of Art. 37 that every credit must stipulate a specified period of time after the date of issuance of the Bills of Lading or other shipping documents during which presentation of documents for payment, acceptance or negotiation must be made. If no such period of time is stipulated, in

> the credit, banks will refuse documents presented to them later than 21 days after the date of issuance of the Bills of Lading or other shipping documents.

U.C.P. Art. 41. Black Crystal bases its arguments on the fact that the Credit does not particularly state a time period after the date of issuance of the bills of lading during which any required documents were to be presented for payment, acceptance or negotiation. While this is true, nothing in Article 41 indicates that the 21 day period extends past the expiration date of a letter of credit. Indeed, the International Chamber of Commerce Banking Commission has determined that Art.41 does not extend the time for presentation beyond the expiration date of a letter of credit. See Decisions of the ICC Banking Commission (1975-1979), Inter-

national Chamber of Commerce Publication No. 371 at 82. [7].

VI. RIGHTS AND OBLIGATIONS UPON NEGOTIATION OF THE CREDIT

Finally, Black Crystal asserts that on July 13, 1981 First National had an absolute obligation to pay Black Crystal's draft. Black Crystal premises this conclusion on the grounds that the Credit was "freely negotiable", meaning that Black Crystal could negotiate a draft on the Credit to any bank Black Crystal

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[7] The Banking Commission agreed that

> If the credit does not stipulate a period of time, documents will be refused if they are presented later then twenty-one (21) days after the date of the issuance of the shipping documents (or, of course, if the credit expires during such period of twenty-one(21) days, if they are presented after the expiry date of the credit).

selected. See UCP General Provisions and Definitions e. Black Crystal asserts that it selected UKB as the negotiating bank and that UKB's receiving, reviewing and approving all of the documents presented by Black Crystal amounted to negotiation, as a matter of law. Relying on UCP Article 13, Black Crystal then argues that once the documents were negotiated that Black Crystal had fulfilled its contractual obligaions under the Credit. At that point Black Crystal concludes, Black Crystal had the right to payment and First National had the obligation to pay. Under Black Crystal's theory, upon negotiation, First National no longer had the right to inspect the documents presented for discrepancies, nor the right to refuse payment of a Credit draft on the basis of any variance with the terms of the Credit. In Black

Crystal's view, these rights and duties fell to UKB as the negotiating bank. The court cannot agree.

First, the court can find no support for Black Crystal's position in the case law or legal treatises dealing with the UCC or the UCP or the law of documentary credits generally. Second, the court can find no specific support for Black Crystal's position in UCP Article 13. UCP Article 13 provides in pertinent part:

> A...negotiating bank which has been authorized to claim reimbursement from a third bank nominated by the issuing bank and which has effected such...negotiation shall not be required to confirm to the third bank that it has done so in accordance with the terms and conditions of the credit.

UCP Art. 13. The apparent purpose behind UCP Article 13 was to take a "reimbursing bank" out of conflicts between the negotiating bank and the issuing bank over proper payment of a letter of credit. According to the ICC Banking Commission, such matters are "of concern only to the issuing bank and the negotiating bank". See Decisions of the ICC Banking Commission (1975-79), International Chamber of Commerce Publication No. 731 at 32-3.

In the Credit in this case, the only "third bank nominated by the issuing bank" as a "reimbursing bank" was the Bank of California. First National was not designated a reimbursing bank in the Credit, and never acted as such as to the Credit. Consequently, Art. 13 does not by its terms apply to First National's position in this case. First National,

as discussed above, was a confirming bank, and under its Confirmation it had the obligation to pay only upon presentation of a draft by UKB which was in conformity with the Credit. Moreover, First National had not only the right, but the duty to its customer, Taipeibank, to inspect the documents before payment and to insist upon strict compliance with the terms of the Credit, including adherence to the stated shipping and expiration dates. Neither Article 13 nor negotiation of the Credit absolved First National of these rights.

For the foregoing reasons, the court concludes that First National properly refused to pay any draft presented by UKB or Black Crystal on the Credit which expired on July 10, 1981.

An appropriate Order will accompany this Memorandum Opinion.

DATED 5 - 11 - 88

SIGNED

Edward H. Johnstone, Chief Judge

United States District Court

[entered May 16 1988]

JESSE W GRIDER CLERK

by signed

DEPUTY CLEK

APPENDIX C

No. 88-5650

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 15 1990
LEONARD GREEN, Clerk

TRANSPORTATION MANAGEMENT & CONSULTING, INC., Plaintiffs v. BLACK CRYSTAL COMPANY, INC., Defendant - 3rd Party Plaintiff Appellant	) O R D E R
UNITED KENTUCKY BANK; YOUSSEF ALI HASSANAIN, Defendants	)
FIRST NATIONAL BANK OF LOUISVILLE, Third Party - Defendant-Appellee	)

BEFORE: KENNEDY and RYAN, Circuit Judges; and SMITH*, United States District Judge.

The Court having received a petition for rehearing en banc, and the petition

having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY THE ORDER OF THE COURT

Leonard Green, Clerk

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*Hon. George C. Smith sitting by designation from the Southern District of Ohio

APPENDIX D-1

UNITED
KENTUCKY
(logo) BANK

No. _____

At sight

LOUISVILLE, KY
July 11, 1981

Pay to the order of
UNITED KENTUCKY BANK, INC $ 1,507,683.21
One Million, Five Hundred Thousand, Six Hundred, Eighty Three and 21/100 DOLLARS

Attached

Surrender Attached Securities or Documents Only on Payment of Draft

Value Received and Charge to Account of

To First National Bank of Louisville
First National Towers
Louisville, Kentucky, 40202

s/Youssef Hassanain

APPENDIX D-2

ASSIGNMENT OF PROCEEDS

KNOW ALL MEN BY THESE PRESENTS: That The Black Crystal Company, Inc. Assignor, A Corporation, existing under the laws of Kentucky, for value received does hereby assign, set over and transfer to Bryan Perry, Assignee at 5402 Dahi Road, Louisville Kentucky 40213 all rights, title and interest to all monies due, or to become due, under Documentary Credit No. OTH2/00790/UO, issued by City Bank of Taipei, Taiwan dated 2/18/81 issued to The Black Crystal Company, Inc., for the account of Lucky Cement Corporation, Taipei,Taiwan, in the amount of One Million Seven Hundred Eighty-Four Thousand Six Hundred Forty and 00/100 U.S.D., of which the balance of $1,758,240.00 remains.

That the amount being assigned herewith is the amount of each draft drawn under the aforementioned Credit up to the aggregate sum of $26,400.00. The Assignee shall not be held responsible for the performance of any work or for the manufacture or delivery of any of the items mentioned in the said Letter of Credit. The Assignor warrants that they have not and will not, by negotiation of drafts or other wise, assign the right to receive the whole or any part of such proceeds or give any other

authorization or direction to make any payment thereof to any third party.

(1) s/NORMAN SYLVESTER FEISTER

(2)(Assignor) s/Bryan Perry

(1) Norman Fiester, Chairman of the Board &

By: President of Black Crystal Company,Inc.

(Authorized Signatory and Title)

(2) Bryan Perry, Executive Vice President

The Black Crystal Company, Inc.

The signatures of Norman Fiester/Bryan Perry with title as stated conforms with that on file with us and is authorized for the execution of such documents.

This signature is subject to the addendum on assignment of proceeds as follows on the back page.

s/Don Reynolds
United Kentucky Bank, Inc.
(Bank)

By: s/Don Reynolds
Authorized Signature

- - - -

said Documentary Credit No. OTH2/00790/U0
direct to The Black Crystal Company, Inc.
_____.

Dated this 20th day of February, 1981.

United Kentucky Bank, Inc
(Bank)

s/Don Reynolds
(Authorized Signature)

APPENDIX D-3

ASSIGNMENT OF PROCEEDS

KNOW ALL MEN BY THESE PRESENTS: That The Black Crystal Company, Inc. Assignor, A Corporation, existing under the laws of Kentucky, for value received does hereby assign, set over and transfer to Keiko Sano Feister's acct. No. 04 114442 0153, Assignee at First California Bank,1675 Post St, S.F.Cal.all rights, title and interest to all monies due, or to become due, under Documentary Credit No. OTH2/00790/UO, issued by City Bank of Taipei, Taiwan dated 2/18/81 issued to The Black Crystal Company, Inc., for the account of Lucky Cement Corporation, Taipei,Taiwan, in the amount of One Million Seven Hundred Eighty-Four Thousand Six Hundred Forty and 00/100 U.S.D., of which the balance of $1,758,240.00 remains.

That the amount being assigned herewith is the amount of each draft drawn under the aforementioned Credit up to the aggregate sum of $26,400.00. The Assignee shall not be held responsible for the performance of any work or for the manufacture or delivery of any of the items mentioned in the said Letter of Credit. The Assignor warrants that they have not and will not, by negotiation of drafts or other wise, assign the right to receive the whole or any part of such proceeds or give any other

authorization or direction to make any payment thereof to any third party.

(1) s/Norman Sylvester Feister

(2)(Assignor) s/Bryan Perry

(1) Norman Fiester, Chairman of the Board &

By: President of Black Crystal Company,Inc.

(Authorized Signatory and Title)

(2) Bryan Perry, Executive Vice President

The Black Crystal Company, Inc.

The signatures of Norman Fiester/Bryan Perry with title as stated conforms with that on file with us and is authorized for the execution of such documents.

This signature is subject to the addendum on assignment of proceeds as follows on the back page.

s/Don Reynolds
united Kentucky Bank, Inc.
(Bank)

By: s/Don Reynolds
Authorized Signature

We have read the above and foregoing assignment and consent to the terms thereof and agree to make the payments sue, and to become due, on account of

said Documentary Credit No. OTH2/00790/U0
direct to The Black Crystal Company, Inc.
_____.

Dated this 20th day of February, 1981.

United Kentucky Bank, Inc
(Bank)

s/Don Reynolds
(Authorized Signature)

APPENDIX D-4

ASSIGNMENT OF PROCEEDS

KNOW ALL MEN BY THESE PRESENTS: That The Black Crystal Company, Inc. Assignor, A Corporation, existing under the laws of Kentucky, for value received does hereby assign, set over and transfer to Greater Egyptian Energy Co., Assignee at Golconda Illinois all rights, title and interest to all monies due, or to become due, under Documentary Credit No. OTH2/00790/UO, issued by City Bank of Taipei, Taiwan dated 2/18/81 issued to The Black Crystal Company, Inc., for the account of Lucky Cement Corporation, Taipei,Taiwan, in the amount of One Million Seven Hundred Eighty-Four Thousand Six Hundred Forty and 00/100 U.S.D., of which the balance of $1440,640.00 remains.

That the amount being assigned herewith is the amount of each draft drawn under the aforementioned Credit up to the aggregate sum of $344,000.00. The Assignee shall not be held responsible for the performance of any work or for the manufacture or delivery of any of the items mentioned in the said Letter of Credit. The Assignor warrants that they have not and will not, by negotiation of drafts or other wise, assign the right to receive the whole or any part of such proceeds or give any other

authorization or direction to make any payment thereof to any third party.

s/Bryan Perry, s/Norman S. Feister
(Assignor)
Bryan Perry, Executive Vice President of
The Black Crystal Company, Inc.

By: s/Norman S. Feister
(Authorized Signatory and Title)

Authorized by Norman Feister, President of Black Crystal Company, Inc. by cable dated to sign the above document.

We have read the above and foregoing assignment and consent to the terms thereof and agree to make payments due, or to become due, on account of said Documentary Credit No. OTH2/00790/U0 direct to The Black Crystal Company, Inc.

However it must be understood that no proceeds can be distributed or funded until they are received by our bank after the vessel is loaded and the required documentation is received by us. Also, any delay caused by sources beyond our control will not qualify for a liability on our part.

Dated this _____ day of _____, 19__.

United Kentucky Bank, Inc
(Bank)

s/Donald C. Reynolds
(Authorized Signatory)

The foregoing instrument was acknowledged before me this 13th day of June, 1981.

APPENDIX D-5

ASSIGNMENT OF PROCEEDS

KNOW ALL MEN BY THESE PRESENTS: That The Black Crystal Company, Inc. Assignor, A Corporation, existing under the laws of Kentucky, for value received does hereby assign, set over and transfer to Antares Shipping & Trading Company, Assignee at San Francisco, California all rights, title and interest to all monies due, or to become due, under Documentary Credit No. OTH2/00790/UO, issued by City Bank of Taipei, Taiwan dated 2/18/81 issued to The Black Crystal Company, Inc., for the account of Lucky Cement Corporation, Taipei,Taiwan, in the amount of One Million Seven Hundred Eighty-Four Thousand Six Hundred Forty and 00/100 U.S.D., of which the balance of $1,058,880.00 remains.

That the amount being assigned herewith is the amount of each draft drawn under the aforementioned Credit up to the aggregate sum of $725,760.00. The Assignee shall not be held responsible for the performance of any work or for the manufacture or delivery of any of the items mentioned in the said Letter of Credit. The Assignor warrants that they have not and will not, by negotiation of drafts or other wise, assign the right to receive the whole or any part of such proceeds or give any other

authorization or direction to make any payment thereof to any third party.

s/Bryan Perry

(Assignor) Bryan Perry, Executive V.P.
Black Crystal Company, Inc.

By: _____
(Authorized Signatory and Title)
Authorized by Norman Feister, President
Black Crystal Company, Inc by cable dated
7/7/81 to sign the above allotment

We have read the above and foregoing assignment and consent to the terms thereof and agree to make payments due, or to become due, on account of said Documentary Credit No. OTH2/00790/UO direct to The Black Crystal Company, Inc.

However it must be understood that no proceeds can be distributed or funded until they are received by our bank after the vessel is loaded and the required documentation is received by us. Also, any delay caused by sources beyond our control will not qualify for a liability on our part.

Dated this 7th day of July, 1981.

United Kentucky Bank, Inc
(Bank)

s/Donald C. Reynolds
(Authorized Signatory)

APPENDIX E

RCA JUL 15 0617

FIRSTLOU LVL

11722 A TAIPEIBK

11722 TTK TO FIRST NATIONAL BANK OF LOUISVILLE

JULY 15

TEST: 27-686 ON USDLS 1,507,683.21

PLS RELAY FOLLOW MESSAGE TO UNITED KENTUCKY BANK LOUISVILLE

RE YOUR TELEX DATED JULY 13 1981 FOR USDLS $1,507,683.21

OUR L/C OTH2/00790/UO UNPAID DUE TO:

1) INVOICE VALUE SHOULD BE USDLS1,451,093.35 CALCULATED AS USDLS67.60 X 22,383.606 MT X (100PCT-4.1PCT)
2) CERT OF WEIGHT SHOULD BE ISSUED BY COMMERCIAL TESTING AND ENGINEERING CO.
3. SPECIFICATION OF SIZE NOT SPECIFY BY COMMERCIAL TESTING AND ENGINEERING CO AND MOISTURE UPON LOADING ON VESSEL 10.36PCT SPECIFIED BY BLACK CRYSTAL DIFFERS FROM THAT IN COMMERCIAL TESTING AND ENGINEERING CO.'S CERT.
4) CERT OF INSPECTION ANALYSIS NOT SPECIFIED THE BASIS OF MOISTURE
5) LATE SHIPMENT

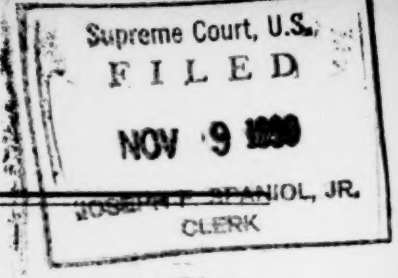
IN RESPONSE OR REPLY TO THIS MATTER PLEASE SEND US WITH TESTED CABLE

TAIPEIBANKD.

FIRSTLOU LVL 11722 A TAIPEIBKMMMM

90-613

No.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

TRANSPORTATION MANAGEMENT & CONSULTING, INC., LANDAF SHIPPING, LTD., POLYKYN NAVIGATION

BLACK CRYSTAL COMPANY, INC. - - Petitioner

versus

UNITED KENTUCKY BANK, YOUSSEF ALI HASSANAIN, FIRST NATIONAL BANK OF LOUISVILLE - - - - - Respondent

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK J. SANDLIN
Counsel of Record

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JAMES M. McDONOUGH
MORGAN AND POTTINGER, P.S.C.
601 West Main Street
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Counsel for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals properly apply the standards set forth by this Court under Fed. R. Civ. P. 56, in affirming the District Court's grant of summary judgment to the Respondent?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Authorities	iii
Statement of the Case	1– 2
Facts	2– 3
Reasons for Denying Writ of Certiorari	3– 6
Conclusion	6– 7
Appendix	1a–24a

TABLE OF AUTHORITIES

Cases: PAGE

Matsushita Electric Industrial Company, Ltd. v. *Zenith Radio*, 475 U.S. 574 (1986) 5

Celotex Corporation v. *Catrett*, 477 U.S. 317 (1986). 5

Anderson v. *Liberty Lobby Incorporated*, 477 U.S. 242 (1986) 4, 5

Blakeman v. *Mead Containers*, 779 F. 2d 1146 (6th Cir. 1985) 4, 5

Smith v. *Hudson*, 600 F. 2d 60 (6th Cir. 1979) 5

Magnum Import Company v. *Coty*, 262 U.S. 159, (1923) 6

Statutes Under Rules:

Fed. R. Civ. P. 56(c) 5, 6

Sup. Ct. R. 10.1 .....3, 5, 6

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

TRANSPORTATION MANAGEMENT & CONSULTING, INC., LANDAF SHIPPING, LTD., POLYKYN NAVIGATION

BLACK CRYSTAL COMPANY, INC. - - - *Petitioner*

v.

UNITED KENTUCKY BANK, YOUSSEF ALI HASSANAIN, FIRST NATIONAL BANK OF LOUISVILLE - - - - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The criteria governing grants of Writs of Certiorari observed by this Court show that the Petition for Writ of Certiorari (the "Petition") filed herein should be denied.

STATEMENT OF THE CASE

This case began in 1982 when Transportation Management Consulting, Inc., Landaf Shipping, Ltd., and Polykyn Navigation, brought an action against Black Crystal Company, Inc. (Petitioner), United Kentucky Bank ("UKB"), and Youssef Ali Hassanain ("Hassanain"). On July 30, 1982, Black Crystal filed its Third Party Complaint against First National Bank of Louisville (Respondent)

and Bank of California International, New York ("Bank of California").

All causes of action by and among the various parties were either resolved by dismissal, judgment or settlement, except for the Third-Party Complaint of Petitioner against Respondent. On May 16, 1988, the United States District Court for the Western District of Kentucky ("District Court"), entered its Order granting Respondent's Motion for Summary Judgment against Petitioner and denying Petitioner's Motion for Summary Judgment against Respondent.

On June 15, 1988, Petitioner filed its Notice of Appeal in this matter. Thereafter, Petitioner embarked on a course of missed deadlines before the Sixth Circuit Court of Appeals ("Sixth Circuit"), culminating in a dismissal of the Appeal on January 12, 1989. The Appeal was reinstated on March 16, 1989. Thereafter the issues were fully briefed, and the parties presented arguments orally to the Sixth Circuit.

The Sixth Circuit, on May 1, 1990, upheld the District Court's grant of Summary Judgment in favor of Respondent. On June 15, 1990, the Sixth Circuit denied the petition for rehearing *en banc* filed by the Petitioner.

FACTS

Due to the Petitioner's convoluted statement of the facts contained in pages 13-35 of its Petition, the Respondent regrets that it cannot accept the Petitioner's statement of facts; nor can the Petitioner specifically identify each and every perceived misstatement of fact contained throughout the Petition. The Petitioner has commingled legal arguments, legal conclusions, and misstatements of fact in its attempt to accurately set forth a statement of facts in this

matter. For example, the Petitioner identifies United Kentucky as the "negotiating bank" (Petition pp. 15, 21), however, the *uncontroverted* testimony from the officer of the United Kentucky Bank is that it *never* was the negotiating bank. This fact was found by and set forth in the opinions of the District Court and the Sixth Circuit. (Respondent's Appendix, pp. 3a, 23a, 24a). The Petitioner concurs with the facts as set forth by the District Court and the Sixth Circuit. In order to accurately set forth the facts of this case, the opinions rendered by the District Court and the Sixth Circuit are contained in the Respondent's Appendix to this brief.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI

I. The Petitioner Has Not Satisfied Any of the Special Criteria Set Out in Supreme Court Rule 10 for Grant of a Writ of Certiorari.

Supreme Court Rule 10.1 provides that a grant of a petition for writ of certiorari is not a matter of right, but a matter of judicial discretion that will only be granted when there are special and important reasons. The Petitioner has no special and important reason for its Petition. The three primary reasons for the granting of a writ of certiorari are as follows:

A. The United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter or has decided a federal question in a way in conflict with the state court of last resort.

B. A state court of last resort has decided a federal question case in a way to conflict with the decision of another state court of last resort or of the United States Court of Appeals.

> C. A state court or United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court.
>
> Sup. Ct. R. 10.1

The Petitioner has failed to demonstrate any of the above reasons for a grant of its Petition.

A. The Sixth Circuit Properly Applied the Standard for Summary Judgment in Affirming the District Court's Decision in Favor of Respondent.

Relying on *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Sixth Circuit found no support for the Petitioner's claim that "facts are immensely in dispute" even when "viewed in the light most favorable to the party opposing the motion" (Respondent's Appendix pp, 3, 4).

The Sixth Circuit's standard in deciding whether summary judgment was proper in favor of the Respondent was:

> whether the evidence presents a sufficient disagreement to require submission to a jury or whether is it so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-252 (1986).

Moreover, the Sixth Circuit's decision quoted *Blakeman* v. *Mead Containers*, 779 F. 2d 1146 (6th Cir. 1985) by holding that:

> [O]n a Motion for Summary Judgment, the movant has the burden of showing *conclusively* that there exists no genuine issue as to any material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the Motion. 779 F. 2d at 1150, quoting

Smith v. *Hudson*, 600 F. 2d 60, 63 (6th Cir.), *Cert. dismissed*, 44 U.S. 986 (1979).

The Sixth Circuit's interpretation of Fed. R. Civ. P. 56 is not in conflict with past decisions of this Court. The Sixth Circuit specifically based its holding on the summary judgment standard set out in *Anderson*. There is no conflict in the standards enumerated by this Court in Fed. R. Civ. P. 56 motions. *Matsushita Electric Industrial Company, Ltd.* v. *Zenith Radio*, 475 U.S. 574 (1986); *Anderson*, 477 U.S. 242 (1986); and *Celotex Corporation* v. *Catrett*, 477 U.S. 317 (1986).

B. This Case Does Not Involve a Federal Question Decision Which Conflicts with the Decision of Another State Court of Last Resort or of a United States Court of Appeals as Specified in Section B of Supreme Court Rule 10.1.

A federal question is defined under 28 U.S.C. § 1257(3) as some title, right, privilege, or immunity that is specially set out or claimed under the constitution, treaties or statutes of the United States. This case does not involve an issue of federal law, a treaty or a constitutional question. In contrast, other recent Supreme Court cases involving the issue of summary judgment have contained specific federal questions which were in conflict among court jurisdictions. For example, *Matsushita* involved the federal Sherman Anti-Trust Act, and *Anderson* dealt with the First Amendment question regarding defamation. The present case contains no federal questions, no constitutional questions, and no questions involving a split of authority between the Federal Circuit Courts of Appeal. The case is a simple commercial case devoid of the criteria set forth in Supreme Court Rule 10.1.

CONCLUSION

The Petition should be denied. The jurisdiction conferred upon this Court to review cases on certiorari was not intended to give the defeated party another hearing. "Certiorari jurisdiction is to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to cure uniformity of decision." *Magnum Import Company* v. *Coty*, 262 U.S. 159, 163 (1923). The strict criteria governing certiorari policy set out in Supreme Court Rule 10.1 must be enforced since the issues argued by the Petitioner do not involve special and important conflicts among the courts and do not involve federal questions.

The Petitioner incorrectly frames the issue to involve letters of credit when in reality it simply involves the well settled standards for summary judgment. The Petitioner attempts to convince this Court that this case is too complex to be appropriate for summary judgment by submitting a petition that contains irrelevant material, shies away from uncontradicted facts, and proposes red herrings as genuine issues. As the District Court recognized, the Respondent had the obligation to pay only upon presentation of a draft, in conformity with the Credit. The Petitioner has failed to make a sufficient showing of this essential element to its case.

The Sixth Circuit followed Fed. R. Civ. P. 56(c) consistent with established standards for summary judgment

set forth by this Court. Accordingly, the Petition should be denied.

By:_____

MARK J. SANDLIN
Counsel of Record

PATRICK E. MORGAN
JAMES M. MCDONOUGH
MORGAN & POTTINGER, P.S.C.
601 West Main Street
Louisville, Kentucky 40202
(502) 589-2780
Counsel for Respondent

APPENDIX

NOT FOR PUBLICATION
See, Sixth Circuit Rule 24

No. 88-5650

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TRANSPORTATION MANAGEMENT & CONSULTING, INCORPORATED;
LANDAF SHIPPING LIMITED;
POLYKYN NAVIGATION, - - - - - - *Plaintiffs*

v.

BLACK CRYSTAL COMPANY, INC., - - - - - - - *Defendant, Third Party-Plaintiff, Appellant,*
UNITED KENTUCKY BANK;
YOUSSEF ALI HASSANAIN, - - - - - *Defendants,*
FIRST NATIONAL BANK OF LOUISVILLE, - - - - - *Third Party-Defendant, Appellee.*

On Appeal from the United States District Court for the Western District of Kentucky.

Filed May 1, 1990

BEFORE: KENNEDY and RYAN, Circuit Judges; and SMITH, District Judge.*

RYAN, Circuit Judge. Third-party plaintiff-appellant, Black Crystal Company, Inc. ("Black Crystal"), appeals

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*The Honorable George C. Smith, United States District Judge for the Southern District of Ohio, sitting by designation.

the district court order granting summary judgment for third-party defendant-appellee First National Bank of Louisville ("First National") in this action involving the issuance and nonpayment of a commercial letter of credit ("the Credit").

Because the record reveals no genuine issue of a material fact, the district court correctly granted summary judgment for appellee First National. Thus, we affirm the district court's judgment.

I.

This case involves a commercial letter of credit issued by the City Bank of Taipei. The beneficiary was identified in the letter of credit as "Black Crystal Company, Inc., Export Division." The Credit also identified United Kentucky Bank as the advising bank. First National was the confirming bank. Although the Credit did not specify a negotiating bank, appellant contends that United Kentucky Bank acted as one. Appellee disputes that contention.

Black Crystal claims that First National was liable for payment under the Credit and that First National wrongfully refused to so pay. Appellant raised the following issues on appeal:

1. Whether the Beneficiary did meet the expiration date of July 10, 1981 so as to be in a position to demand payment under the letter of credit.
2. Whether the Beneficiary presented the documents to a bank in a position to accept the documents and accept responsibility as a negotiating bank.
3. Whether the Beneficiary did fulfill the terms and conditions of the letter of credit.
4. Whether the dishonor of the letter by the bank which had undertaken to confirm, First National Bank, was wrongful.

5. Whether the dishonor was entirely the fault of First National Bank, or whether other parties, including United Kentucky Bank, Bank of California International etc. shared some responsibility.
6. What was the effect of "Amendment 9" i.e. was it a true amendment?
7. Was "Amendment 9" wrongful in itself, and the result of negligence or deliberate interference with the transaction?
8. Given the conflicts of the testimony and interpretations of factual developments in the case, was summary judgment a proper remedy?

II.

A court deciding a motion for summary judgment must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

> "[O]n a motion for summary judgment the movant has the burden of showing *conclusively* that there exists no genuine issue as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion."

Blakeman v. *Mead Containers*, 779 F. 2d 1146, 1150 (6th Cir. 1985), *quoting Smith* v. *Hudson*, 600 F. 2d 60, 63 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979).

Appellant argues that summary judgment was inappropriate in this case because "the facts are immensely in dispute." Appellant claims that it timely submitted the docu-

ments required by the Credit to United Kentucky Bank, a bank claimed by appellant to be a negotiating bank. The record does not support appellant's claims.

After carefully examining the record, we conclude that summary judgment for appellee was appropriate because there is no genuine issue as to any *material* fact.

Finally, appellant argues that the District Court erred in failing to consider the application of appellant's waiver and estoppel theories. Appellant contends that because the United Kentucky Bank did not notify Black Crystal of any problems when the documents were presented to and accepted by Hassanain on July 10, the fact that First National refused to accept them after the expiry date can have no effect on Black Crystal's right to payment. However, appellant's argument assumes that United Kentucky Bank acted as a negotiator of the letter of credit when in fact it did not. The undisputed testimony of the Kentucky Bank's officer, who was responsible for dealing with Black Crystal's affairs, was that at no time did United Kentucky Bank negotiate the letter of credit.

For the reasons fully detailed by the district court in its well-written opinion which we fully adopt as though it were our own, we AFFIRM.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action No. 82-350L(J)

TRANSPORTATION MANAGEMENT & CONSULTING, INC., et al., - - - - *Plaintiffs,*

v.

BLACK CRYSTAL CO., INC., et al., - - *Defendants.*

MEMORANDUM OPINION—Entered May 16, 1988

This case presents the court with a veritable Augean stable of questions concerning the issuance and payment of a letter of credit issued as part of a contract between Black Crystal Coal Company of San Francisco, California (hereinafter Black Crystal) and Lucky Cement Corporation, of Taiwan (hereinafter Lucky Cement). Before the court are First National Bank of Louisville's Motion for Summary Judgment on Black Crystal's Third Party Complaint and Black Crystal's Motion for Summary Judgment on its Third Party Complaint. Jurisdiction is proper under 28 U.S.C. § 1332.

I. FACTS

On or about January 30, 1981, Lucky Cement Corporation of Taipei, Taiwan contracted with Black Crystal Coal Company for the purchase and sale of more than 126,000 metric tons of steaming coal. The coal was to be shipped in five shipments of from 25,000 to 26,400 metric tons from the United States to Taiwan. As part of their agreement,

Lucky Cement had an irrevocable, negotiable letter of credit (hereinafter referred to as the Credit) in the amount of $1,784,640.00 issued for the benefit of Black Crystal by the City Bank of Taipei (hereinafter Taipeibank).

On or about February 18, 1981 the Credit was sent by tested telex to First National Bank of Louisville in Louisville, Kentucky (hereinafter First National). The Credit expressly designated the Bank of California International as the reimbursing bank and the United Kentucky Bank (hereinafter UKB) as an advising bank, but did not designate a negotiating bank. The final shipping date set forth was March 19, 1981 and the expiration date was March 29, 1981. The Credit provided for payment of drafts if accompanied by certain commercial invoices, Ocean Bills of Lading, an Order of the City Bank of Taipei, a Certificate of Origin, a Certificate of Inspection Analysis and Weight, a Certificate from the beneficiary, and an Original Suppliers Certificate. As a final matter, the telex stated that it was "subject to" the Uniform Customs and Practices for Documentary Credits, International Chamber of Commerce Publication 290 (hereinafter abbreviated UCP.)[1]

---

[1]The Credit telex provided as follows:

FIRST NATIONAL BANK OF LOUISVILLE
LOUISVILLE, KENTUCKY
USA

TEST:——
PLS ADVISE THRU UNITED KENTUCKY BANK
LOUISVILLE
WE OPEN IRREVOCABLE CREDIT 0TH2/00790/UO
BENEFICIARY BLACK CRYSTAL COMPANY INC. EXPORT DIV 1144 CLAY STREET
SAN FRANCISCO CALIF 94100 USA
ACCOUNTEE LUCKY CEMENT CORP 8TH FL
95 SHIN LIN FU-KUO RD TAIPEI

(Continued on following page.)

(Continued from preceding page.)

TAIWAN REPUBLIC OF CHINA
AMOUNT USDLS $1,784,640.00
COVERING 26,400 MT AMERICAN STEAMING COAL IN BULK AT SELLER'S OPTION, AT USDL $67.60 PER METRIC TON CANDF SUAO FREE OUT LATEST SHIPPING MAR 19 1981 EXPIRY MAR 29 1981
SHIPMENT FROM NEW ORLEANS TO SUAO
PARTIAL SHIPMENTS ALLOWED TRANSHIPMENT PROHIBITED
AVAILABLE AGAINST BENEFICIARY'S DRAFT(S) DRAWN ON US AT 180 DAYS AFTER SIGHT FOR FULL INVOICE COST ACCOMPANIED BY THE FOLLOWING DOCTS:
SIGNED COMMERCIAL INVOICE IN QUINTUPLICATE INDICATING IMPORT PERMIT NO. 69RC1-008859B
FULL SET OF CLEAN ON BOARD OCEAN BLLS OF LADING MADE OUT TO THE ORDER OF CITY BANK OF TAIPEI TAIPEI MARKED FREIGHT PREPAID NOTIFY BUYER
CERTIFICATE OF ORIGIN IN TRIPLICATE ISSUED BY GOVERNMENTAL AUTHORITY
THE CERTIFICATE OF INSPECTION ANALYSIS AND WEIGHT IN QUINTRIPLICATE ISSUED BY COMMERCIAL TESTING CO.
BENEFICIARIES' CERTIFICATE STATING THAT DUPLICATE SET OF THE ABOVE DOCUMENTS HAS BEEN AIRMAILED BY REGISTERED EXPRESS MAIL DIRECTLY TO THE BUYER BY BENEFICIARY WITHIN 3 DAYS AFTER THE SHIPMENT IS EFFECTED
ONE ORIGINAL SUPPLIERS CERTIFICATE (BLANK FORM AIRMAILING)
ALL BANKING CHARGES OUTSIDE TAIWAN ARE FOR A/C OF BENEFICIARY
THE USANCE DRAFT(S) DRAWN HEREUNDER ARE NEGOTIABLE ON A SIGHT BASIS WITH DISCOUNT CHARGES AND ACCEPTANCE COMMISSIONS FOR BUYER'S A/C

(Continued on following page.)

(Continued from preceding page.)

SPECIAL INSTRUCTIONS:

1) CHARTER PARTY D/L IS ACCEPTABLE

2) T/T REIMBURSEMENT CERTIFYING COMPLIANCE IS ACCEPTABLE

3) WITHIN 10 DAYS AFTER RECEIPT OF THIS L/C ADVICE, BENEFICIARY MUST ESTABLISH A LETTER OF GUARANTEE OR STAND-BY L/C FOR USDLS $3,460.00 VIA ADVISING BANK AS PERFORMANCE BOND TO CITY BANK OF TAIPEI TAIPEI THIS L/C OR L/G SHALL BE RELEASED WITHOUT INTEREST AFTER THE CONTRACTED COMMODITY HAS ARRIVED IN TAIWAN AND HAS BEEN FOUND TO BE IN ACCEPTABLE CONDITION, AND SELLER'S PAYMENT MADE TO THE BUYER OF DESPATCH MONEY AND PENALTY WHICH WILL BE NOTICED BY BUYER THROUGH THE ISSUING BANK

TO THE NEGOTIATING BANK ONLY: UPON NEGOTIATION OF THE DRAFT DRAWN UNDER THIS CREDIT PLS CABLE US OF THE AMOUNT NEGOTIATED FOR REIMBURSEMENT, PLS DRAW AT SIGHT ON THE BANK OF CALIF INTL NEW YORK FOR THE FACE AMOUNT OF THE DRAFT UPON NEGOTIATION CERTIFYING IN COMPLIANCE WITH THE CREDIT TERMS AND CONDITIONS

ALL DOCUMENTS ARE TO BE DESPATCHED IN TWO SETS BY CONSECUTIVE AIRMAILS TO THE ISSUING BANK

WE UNDERTAKE THAT DRAFTS DRAWN AND PRESENTED IN CONFORMITY WITH THE TERMS OF THIS CREDIT WILL BE DULY HONORED SUBJECT TO UCP FOR DOCUMENTARY CREDIT (1974 REVISION) INTL CHAMBER OF COMMERCE BROCHURE NO 290

TAIPEIBANK

After the Credit was opened, Black Crystal used it to finance the mining, trucking, testing and transportation of the coal called for in the Lucky Cement/Black Crystal contract by assigning rights to proceeds from the Credit to the various mining, trucking and barging companies involved. Despite Black Crystal's efforts and arrangements however, it was unable to meet the March 1981 contract dates. Accordingly, Black Crystal requested and received four extensions of its performance dates and four corresponding extensions of the Credit's shipping and expiration dates in Amendments 6, 7, 8, and 10 to the Credit. Under the terms of Amendment 10, the shipping date was extended to June 30, 1981 and the Credit's expiration date was extended to July 10, 1981.

At some point, Black Crystal found it desirable or necessary to have its Credit confirmed by another bank. To this end, on May 25, 1981, Black Crystal sent a telex to First National asking First National to notify Taipeibank that Black Crystal wanted the Credit confirmed. First National sent a telex on behalf of Black Crystal to Taipeibank reciting Black Crystal's request. Two days later, on May 27, 1981, First National, on its own behalf, sent another telex to Taipeibank requesting authorization to confirm. The First National telex stated in part

> Please authorize us by tested telex to confirm this letter of credit.
>
> Also please amend L/C to read 'available against beneficiary's draft(s) drawn on First National Bank of Louisville, Kentucky at 180 days after sight for full invoice cost.'

On May 28, 1981 Taipeibank, by telex, agreed to a confirmation of the Credit and authorized First National to confirm, but stated that "all other terms and conditions remain unchanged."

On May 29, 1981, First National confirmed the Credit in Amendment 9. In that Amendment First National stated:

> We confirm this Credit and thereby undertake that all drafts drawn and presented to First National Bank of Louisville by United Kentucky Bank, International Dept., P.O. Box 34000, Louisville, Kentucky 40232, on behalf of the beneficiary of this Credit in conformity with the terms of this Credit will be duly honored by First National of Louisville if all terms and conditions of this Credit have been met and as soon as First National Bank of Louisville has been reimbursed by the Bank of California International, New York for face amount of the draft in available funds. First National Bank of Louisville will then paid (sic.) in available funds to United Kentucky Bank the amount of any drawing less First National Bank of Louisville's fee for United Kentucky Bank to disburse proceeds to the beneficiary and/or their assignees if any.

This amendment was signed by representatives of UKB and Black Crystal.

The same day that First National confirmed the Credit, the first shipment of coal mined for the Black Crystal/Lucky Cement contract was beginning to be loaded on river barges at the Lyon County Coal Terminal in Kentucky. All did not go smoothly. There was some dispute with the Lyon County Coal Terminal concerning payment of terminal charges and loading was delayed. On June 10, after approximately 6 barges had been loaded, Black Crystal transfered loading operations to Reid Quarry, where the remainder of the coal was loaded on 10 more barges and all 16 were sent downstream to New Orleans, Louisiana. The 16 barges of coal arrived in New Orleans for mid-

stream stevedoring and loading to vessel around June 23, 1981.

At some point prior to the coal's arrival in New Orleans, Black Crystal entered negotiations with Cerbere & Co., Ltd. (hereinafter Cerbere) for ocean transportation of the coal to Suao, Taiwan on board the ship EASTERN HORNET. Cerbere agreed to ship the coal and accept an assignment of proceeds for ocean freight charges, provided a proper key tested telex was sent from a confirming bank to Cerbere's bank, Banco Urquijo, authenticating Black Crystal's Credit. Apparently Black Crystal asked First National to send an authenticating telex to Banco Urquijo, but no such telex was sent. Thereafter, in late June, 1981, Cerbere threatened to cancel its arrangement with Black Crystal because the no telex had been sent to Banco Urquijo. Cerbere gave Black Crystal until June 29, 1981 to send a telex.

On June 29, 1981, First National contacted Cerbere concerning Black Crystal's credit. Evidently there was some difficulty, misunderstanding or disagreement between Cerbere and First National because First National apparently never sent the requested telex to Banco Urquijo. Black Crystal alleges that as a direct consequence of First National's actions, charter party negotiations between Black Crystal and Cerbere ended on June 29, 1981. After the break up of negotiations with Cerbere, Black Crystal arranged transportation of the coal by spot chartering the ship SAN NICHOLAS from Anteres Shipping and Trading Corporation. The Charter Party agreement for the transportation of the coal aboard the SAN NICHOLAS was signed in San Francisco on June 30, 1981.

On July 9 and 10, 1981, the coal was loaded aboard the SAN NICHOLAS. Youssef Ali Hassanain (Hassanain), an officer of UKB from Louisville, Kentucky, was in New Orleans to observe the loading and to receive the bills of lading and other documents relating to the coal. After

the coal was loaded on board the SAN NICHOLAS, Hassanain took the bills of lading and other documents and returned to Louisville. He testified at a deposition that when he returned to Louisville from New Orleans, he had all the documents that were required to be used in the negotiation of the Credit.

Black Crystal claims that thereafter, on July 12 and 13, 1981, Hassanain prepared and mailed two sets of the documents required by the Credit to Taipeibank and First National. In these mailings Hassanain allegedly certified that he had all the documents in satisfaction of the Credit's terms and conditions and requested payment be wired to UKB. First National disputes this, and claims that neither the documents required by the Credit nor a draft drawn on the Credit was ever actually presented to First National for payment. In any case, on July 13, 1981, a First National representative told Hassanain that no extension to the Credit's expiration date had been received and that the Credit had expired on July 10. First National refused to honor UKB's draft and never paid any draft drawn on the Credit.

On July 17, 1981 the Bank of California received a telex from Taipeibank instructing the Bank of California not to pay any reimbursement requested under the Credit. The telex went on to state that payment should be made "only upon receipt of our further instructions." On July 20, 1981 the Bank of California received another telex from Taipeibank requesting that the Bank of California confirm the receipt of the July 17 message and asking the Bank of California whether it had paid under the Credit. The Bank of California responded by telex that it had not received a reimbursement claim to that time and that it would inform Taipeibank upon receiving a demand and before paying.

On July 27, 1981 representatives of UKB and Black Crystal visited the New York office of the Bank of California and delivered documents intended to be in satisfaction of the terms and conditions of the Credit. The Bank of California examined the documents, found discrepancies, and refused to pay. A Black Crystal representative returned to the Bank of California's offices on July 28, 1981 with proposed amendments, but the Bank of California still refused to pay. The Bank of California sent a telex to UKB on July 29, 1981 enumerating the discrepancies in the documents and calling attention to the instructions from Taipeibank not to pay. The Bank of California was never authorized to and never made any payment under the Credit.

Meanwhile, the coal which was loaded on board the San-Nicholas in New Orleans had been transported across the ocean to a point off the coast of Taiwan. Once there however, the coal was not unloaded. Allegedly, the ocean shippers refused to unload the coal until they were paid. Since payment was not forthcoming, they apparently disposed of the coal at a port in Korea.

In 1982 the inland and ocean-going shippers of the coal instituted this suit against Black Crystal and UKB. Black Crystal filed a Third Party Complaint against First National.

II. NATURE OF THE TRANSACTION

The court must begin analysis of this matter by noting some uncertainty about the legal nature of the transactions and relationships at issue here. Some authorities view letters of credit arrangements as something separate from the traditional contract. *See, e.g., Voest-Alpine Intern. Corp.* v. *Chase Manhattan Bank,* 707 F. 2d 680, 682-83 (2d Cir. 1983); *Bank of Cochin Ltd.* v. *Manufacturers Hanover*

Trust, 612 F. Supp. 1533, 1537 (S.D. N.Y. 1985), *aff'd*, 808 F. 2d 209 (2d Cir. 1986); J. White and R. Summers, Uniform Commercial Code at § 18-2 (2d ed.1980); 1 A. Lowenfeld, International Private Trade § 5.53 at 103 (1977). Other authorities have viewed letters of credit as executory unilateral contracts, to which general contract principles are applicable. *See, e.g., Union Planters National Bank* v. *World Energy Systems*, 816 F. 2d 1092, 1098 (6th Cir. 1987); *Bank-of North Carolina, N.A.* v. *Rock Island Bank*, 570 F. 2d 202, 207 (7th Cir. 1978); *Venizelos, S.A.* v. *Chase Manhattan Bank*, 425 F. 2d 461, 465-66 (2d Cir. 1970); *Transparent Products* v. *Paysaver Credit Union*, 198 U.S. Dist. LEXIS 605 (N.D. Ill., Jan. 21, 1988); *Worldwide Sugar Co.* v. *Royal Bank of Canada*, 609 F. Supp. 19, 23-24 (S.D. N.Y. 1984); *Consolidated Aluminum Corp.* v. *Bank of Virginia*, 544 F. Supp. 386, 395 (D. Md. 1982), *aff'd*, 704 F. 2d 136 (2d Cir. 1983).

Regardless of the legal description of the parties' relationships in this case, this court is bound to apply the terms of the letter of credit as it was agreed to by the parties. Consequently, the court must refrain from injecting its own views into the parties' agreements or from remaking the agreements which they have freely entered. With these general principles in mind the court will consider the rights and obligations of the parties under the Credit, under First National's confirmation of the Credit, under Article 41 of the UCP, and under UKB's negotiation of the Credit.

III. RIGHTS AND OBLIGATIONS UNDER THE CREDIT

The Credit in this case was issued on or about February 18, 1981 by Taipeibank on behalf of its customer, Lucky Cement. The Credit expressly stated that it was "subject to" the UCP. Black Crystal argues that this provision precludes the application of Article 5 of the Uniform Com-

mercial Code[2] (hereinafter the UCC) to the parties' relationships. First National disagree. Because there is little or no substantive difference between the rights and obligations imposed by the UCC and the UCP to the relationships considered here, the court need not choose between the UCC and the UCP to resolve this matter.

A letter of credit is purely a transaction in documents. *See Banco Nacional de Desarrollo* v. *Mellon Bank, N.A.*, 726 F. 2d 87, 91 (3d Cir. 1984); *Chase Manhattan Bank* v. *Equibank*, 550 F. 2d 882, 885 (3d Cir. 1977); *Courtaulds North America, Inc.* v. *North Carolina National Bank*, 528 F. 2d 802, 805-06 (4th Cir. 1975); UCP Art. 8(a). In the typical letter of credit transaction an issuing bank draws a letter of credit in favor of a beneficiary for the payment of money upon presentation of certain documents prepared for the issuing bank's customer pursuant to a contract between the customer and the beneficiary. *See* Ky. Rev. Stat. § 355.5-103(1)(a); UCP General Provisions and Definitions b. In essence therefore, a letter of credit is an engagement by the issuing bank for the purchase of the documents specified in the letter of credit. *See Equibank, supra*, at 885.

In such an arrangement the issuing bank has the obligation to pay *only* upon a presentation made in accord with the terms of the letter of credit. *See Union Planters National Bank* v. *World Energy Systems*, 816 F. 2d 1092, 1098 (6th Cir. 1987); Ky. Rev. Stat. § 355.5-114(1); UCP Art. 3(a). Upon proper presentation, the beneficiary has the right to collect payment from the issuing bank and the issuing bank has the corresponding right to collect from its customer any sums paid under the credit. See Ky. Rev. Stat. § 355.5-114(3). Before the issuing bank may pay or the

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[2]Article 5 of the Uniform Commercial Code is enacted in Kentucky as Ky. Rev. Stat. § 355.5-101 *et seq.*

beneficiary collect, the issuing bank has the duty to ensure that the presentation strictly conforms to the terms of the letter of credit.[3] *See* KY. REV. STAT. § 355.5-109(2); UCP Art. 7. In the absence of strict conformity, the beneficiary cannot force payment and the bank pays at its peril. *See Equibank, supra* at 886. In the case of the documents required by the letter of credit, this means the issuing bank has the right to examine them to "ascertain that on their face they appear to comply with the terms of the credit." KY. REV. STAT. § 355.5-109(2); *accord* UCP Arts. 7 and 8. If the documents do not strictly comply with the terms and conditions contained in the letter of credit, an issuing bank is not required to pay the draft presented. *See Board of Trade of San Francisco* v. *Swiss Credit Bank*, 728 F. 2d 1241, 1243 (9th Cir. 1984); *Banco Nacional de Desarrollo* v. *Mellon Bank, N.A.*, 726 F. 2d 87, 91 (3d Cir. 1984); *Voest-Alpine Intern. Corp.* v. *Chase Manhattan Bank*, 707 F. 2d 680, 682-83 (2d Cir. 1983); *Courtaulds North America, Inc.* v. *North Carolina National Bank*, 528 F. 2d 802, 806 (4th Cir. 1975); *Venizelos, S.A.* v. *Chase Manhattan Bank*, 425 F. 2d 461, 464-65 (2d Cir. 1970).

The issuing bank also has the right to insist that a beneficiary strictly comply with any time restrictions in the letter of credit. The time restrictions placed upon the beneficiary are perhaps the most important and material requirements affecting the parties' rights since they fix

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[3]Whether a letter of credit beneficiary is held to a standard of strict compliance is a matter of local law. *Tosco Corp.* v. *FDIC*, 723 F. 2d 1241 (6th Cir. 1983). Nothing in the UCC or the UCP indicates that the strict compliance rule should not be followed in letters of credit "subject to" the UCP. Although there is no Kentucky case law on this point, Kentucky would probably follow the majority rule requiring strict compliance with the terms of credit. *Cf. UTICA Mut. Ins. Co.* v. *Walker*, 725 S.W. 2d 24, 26 (Ky. Ct. App. 1987) (applying New York law).

with certainty the liability of the issuing bank. *See Consolidated Aluminum Corp.* v. *Bank of Virginia*, 554 F. Supp. 386, 397 (D. Md. 1982), *aff'd*, 704 F. 2d 136 (2d Cir. 1983); *Bank of America National Trust and Savings Ass'n* v. *Liberty National Bank and Trust Co.*, 218 F. 2d 831, 840-41 (10th Cir. 1955) ("[W]here a date is fixed in a letter of credit for its expiration, such provision becomes an important condition, and there must be strict compliance with it before there can be liability on the part of a bank issuing the letter."). *See also Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W. 2d 185, 187 (Tex. Civ. App. 1980). Consequently, the issuing bank has the right to insist that the beneficiary of a letter of credit present the required documents prior to the expiration of the letter of credit or demonstrate that he could have presented them in a timely fashion but was unjustifiably prevented from doing so. *See Consolidated Aluminum, supra* at 391-92; *North American Foreign Trading Corp.* v. *General Electronics Ltd.*, 413 N.Y.S. 2d 700, 26 U.C.C.R.S. 168, 171 (N.Y. App. Div. 1979); *see also* Ky. Rev. Stat. § 355.3-511; UCP Arts. 11 and 39. If the documents are not presented on time, the issuing bank's obligations end at the expiration date and the issuing bank need not pay a draft on the letter of credit. *See Consolidated Aluminum, supra,* at 397-98; *Hyland Hills Metropolitan Park and Recreational District* v. *McCoy Enterprises, Inc.*, 554 P. 2d 708, 20 U.C.C.R.S. 488, 491 (Colo. Ct. App. 1976).

In this case the Credit was an engagement between Taipeibank (the issuing bank) and Black Crystal (the beneficiary), for the payment of money upon the proper presentation of certain documents (bills of lading, etc.) prepared at the behest of Lucky Cement (Taipeibank's customer) pursuant to the terms of the Lucky Cement/Black Crystal coal contract of January 30, 1981. In its position as issuing bank, Taipeibank had the right and obligation to inspect

the documents presented and to require strict adherence to all of the Credit's terms, including the expiration date.

IV. RIGHTS AND OBLIGATIONS UNDER THE CONFIRMATION

On May 29, 1981, pursuant to the request and authorization of Taipeibank, First National "confirmed" Black Crystal's Credit (hereinafter referred to as the Confirmation). In so doing, First National assumed the position of a "confirming bank" under both the UCC and the UCP.

A confiming bank "is a bank which engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank." KY. REV. STAT. § 355.5-103(1)(f); *accord* UCP Art. 3(b). Thus, a confirming bank essentially assumes the obligations of an issuing bank as to the Credit confirmed. *See* KY. REV. STAT. § 355.5-107(2) and comment; UCP Art. 3(b).[4] However, the obligations that a confirming bank assumes need not exactly mirror the issuing bank's obligations under the letter of credit.

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[4]In the present case First National generally assumed the rights and duties of Taipeibank as to the Credit when it confirmed the Credit. Thus, as discussed above, First National had the duty to pay according to the Credit "provided that the terms and conditions of the Credit are complied with." *See* UCP Art. 3(b); KY. REV. STAT. § 355.5-109. Additionally, First National, like Taipeibank, had the right and duty to examine all documents presented with reasonable care upon presentation to determine that they conformed to the conditions of the credit. *See Seattle-First Nat. Bank* v. *F.D.I.C.*, 619 F. Supp. 1351, 1362 (D.C. Ok. 1985); KY. REV. STAT. § 355.5-109(2); UCP Arts. 7. Upon proper presentation and payment of a Credit draft, First National had the right to reimbursement from its customer, Taipeibank. KY. REV. STAT. 355.5-114(3).

A confirmation is a separate engagement, independent from the letter of credit which it confirms. The obligations created by a confirmation are distinct from the issuing bank's obligations on the letter of credit. Consequently, the terms of a confirmation generally do not affect the obligations running between the issuing bank and the beneficiary—they merely add another, parallel set of obligations into the milieu. *See* UCP 3(b); KY. REV. STAT. § 355.5-107(2), and comment. Both the UCC and the UCP allow the parties to restrict these obligations and rights by agreement. *See* UCP General Provisions (a)[5]; KY. REV. STAT. § 355.5-107(2).[6] Such a restricted confirmation is not necessarily an amendment of the letter of credit.

In the present case, First National confirmed Taipeibank's Credit in Amendment 9 thereto. The Confirmation contained terms and conditions slightly at variance with the original Credit. Specifically, the Confirmation stated that First National would pay under the Credit *only* 1) on payment of $2,000 of "confirmation fees", 2) on drafts presented by United Kentucky Bank, 3) on drafts in conformity with the terms of the Credit, and 4) upon reimbursement by the Bank of California International. These varying terms did not serve to alter the Credit, but created a separate, parallel obligation on the part of First National to pay, provided that the Confirmation's terms and condi-

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[5]UCP General Principles and Definitions (a) states:

> These provisions and definitions in the following articles apply to all documentary credits and are binding upon all parties thereto unless otherwise expressly agreed.

[6]Section 355.5-102(2) provides in pertinent part:

> A confirming bank . . . becomes directly obligated on the credit *to the extent of its confirmation* as though it were an issuer.

KY. REV. STAT. § 355.5-102(2) (emphasis added).

tions were met. The Confirmation was assented to by Bryan Perry (Perry), a Black Crystal vice president. Black Crystal now claims that Perry did not understand the Confirmation and that he did not have the authority to agree to the Confirmation on behalf of Black Crystal. *See* Black Crystal's Reply Memorandum in Support of its Motion for Summary Judgment against First National Bank at 17-19. Although this is a dispute of fact, it is not material to the resolution of this case.

If Perry were without authority to assent to the Confirmation, then the Confirmation was presumably ineffective. If the Confirmation was ineffective, then First National did not "confirm" the Credit within the meaning of the UCC and the UCP and was not obliged to pay according to the Confirmation. Therefore, First National had no obligation to honor UKB's presentation of documents and demand for payment, whenever it was made. On the other hand, if Perry did have authorty to assent then First National did "confirm" the Credit and was obliged to pay according to the Confirmation's terms. One of those terms was that all the terms and conditions of the Credit had to be met before First National would pay. First National had the right to insist that this term be strictly complied with. The undisputed facts reveal however, that Black Crystal did not meet all of the terms of the Credit.

The Confirmation set June 30, 1981 as the final date for shipping the coal, and July 10, 1981 as the expiration date of the Credit. Black Crystal admits that the coal was not loaded for ocean shipping until July 9-10, 1981 and was shipped thereafter. Additionally, Black Crystal admits that it presented the documents and draft required by the Credit on or about July 13, 1981, three days after the Credit's expiration. Thus, the coal was shipped and the presentment was made after the deadline set for each. Because Black Crystal did not meet either these deadlines,

First National was within its rights in refusing to honor UKB's demand for payment.

Black Crystal implicitly argues that it was unjustifyably prevented from meeting the shipping and expiration dates in the Credit as a direct result of First National's failure to send an authenticating telex to Banco Urquijo. The court cannot agree. First National was under no obligation to send or receive telexes for or on behalf of Black Crystal. *See* Ky. Rev. Stat. § 355.5-107(4); UCP Art. 10. Black Crystal offers no proof that First National ever promised to send such a telex. Therefore, First National was justifiably within its rights in failing or refusing to send such a telex. Black Crystal offers no other proof that would justify its failure to meet the Credit dates, such as proof that First National maliciously or in bad faith failed to send the telex. *See* Ky. Rev. Stat. § 355.5-109(1). In the absence of such evidence, First National cannot be held liable for the problems between Black Crystal and its shipper which may have caused Black Crystal to miss the Credit deadlines. *See* Ky. Rev. Stat. § 355.5-109(1)(b).

V. RIGHTS UNDER UCP ARTICLE 41 AND THE TIME FOR PRESENTATION

Black Crystal alleges that UCP Article 41 gave Black Crystal 21 days after July 10, 1981 to present the documents and a draft. The court cannot agree. Article 41 provides:

> Notwithstanding the requirement of Article 37 that every credit must stipulate a specified period of time after the date of issuance of the Bills of Lading or other shipping documents during which presentation of documents for payment, acceptance or negotiation must be made. If no such period of time is stipulated in the credit, banks will refuse documents presented

> to them later than 21 days after the date of issuance of the Bills of Lading or other shipping documents.

U.C.P. Art. 41. Black Crystal bases its argument on the fact that the Credit does not particularly state at time period after the date of issuance of the bills of lading during which any required documents were to be presented for payment, acceptance or negotiation. While this is true, nothing in Article 41 indicates that the 21 day period extends past the expiration date of a letter of credit. Indeed, the International Chamber of Commerce Banking Commission has determined that Art. 41 does not extend the time for presentation beyond the expiration date of a letter of credit. *See* Decisions of the ICC Banking Commission (1975-1979) International Chamber of Commerce Publication No. 371 at 82.[7]

VI. RIGHTS AND OBLIGATIONS UPON NEGOTIATION OF THE CREDIT

Finally, Black Crystal asserts that on July 13, 1981, First National had an absolute obligation to pay Black Crystal's draft. Black Crystal premises this conclusion on the grounds that the Credit was "freely negotiable," meaning that Black Crystal could negotiate a draft on the Credit to any bank Black Crystal selected. *See* UCP General Provisions and Definitions e. Black Crystal asserts that it selected UKB as the negotiating bank and that UKB's receiving, reviewing and approving all of the docu-

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[7]The Banking Commission agreed that

> If the credit does not stipulate a period of time, documents will be refused if they are presented later than twenty-one (21) days after the date of issuance of the shipping documents (or, of course, if the credit expires during such period of twenty-one (21) days, if they are presented after the expiry date of the credit).

ments presented by Black Crystal amounted to negotiation, as a matter of law. Relying on UCP Article 13, Black Crystal then argues that once the documents were negotiated that Black Crystal had fulfilled its contractual obligations under the Credit. At that point, Black Crystal concludes, Black Crystal had the right to payment and First National had the obligation to pay. Under Black Crystal's theory, upon negotiation, First National no longer had the right to inspect the documents presented for discrepancies, nor the right to refuse payment of a Credit draft on the basis of any variance with the terms of the Credit. In Black Crystal's view, these rights and duties fell to UKB as the negotiating bank. The court cannot agree.

First, the court can find no support for Black Crystal's position in the case law or legal treatises dealing with the UCC or the UCP or the law of documentary credits generally. Second, the court can find no specific support for Black Crystal's position in UCP Article 13. UCP Art. 13 provides in pertinent part:

> A . . . negotiating bank which has been authorized to claim reimbursement from a third bank nominated by the issuing bank and which has effected such . . . negotiation shall not be required to confirm to the third bank that it has done so in accordance with the terms and condition of the credit.

UCP Art. 13. The apparent purpose behind UCP Article 13 was to take a "reimbursing bank" out of conflicts between the negotiating bank and the issuing bank over proper payment of a letter of credit. According to the ICC Banking Commission, such matters are "of concern only to the issuing bank and the negotiating bank." *See* Decisions of the ICC Banking Commission (1975-79), International Chamber of Commerce Publication No. 371 at 32-3.

In the Credit in this case, the only "third bank nominated by the issuing bank" as a "reimbursing bank" was the Bank of California. First National was not designated a reimbursing bank in the Credit, and never acted as such as to the Credit. Consequently, Art. 13 does not by its terms apply to First National's position in this case. First National, as discussed above, was a confirming bank, and under its Confirmation it had the obligation to pay only upon presentation of a draft by UKB which was in conformity with the Credit. Moreover, First National had not only the right, but the duty to its customer, Taipeibank, to inspect the documents before payment and to insist upon strict compliance with the terms of the Credit, including adherence to the stated shipping and expiration dates. Neither Article 13 nor negotiation of the Credit absolved First National of these rights.

For the foregoing reasons, this court concludes that First National properly refused to pay any draft presented by UKB or Black Crystal on the Credit which expired on July 10, 1981.

An appropriate Order will accompany this Memorandum Opinion.

Dated 5 - 11 - 88

(s) Edward H. Johnstone
Edward H. Johnstone, Chief Judge
United States District Judge

Supreme Court, U.S.
FILED
NOV 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

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In The Supreme Court
of the
United States

OCTOBER TERM, 1990

No. 90-613

BLACK CRYSTAL COMPANY, INC.,
Petitioner
V.
FIRST NATIONAL BANK OF LOUISVILLE
Respondent

In Reply to Brief in Opposition to
PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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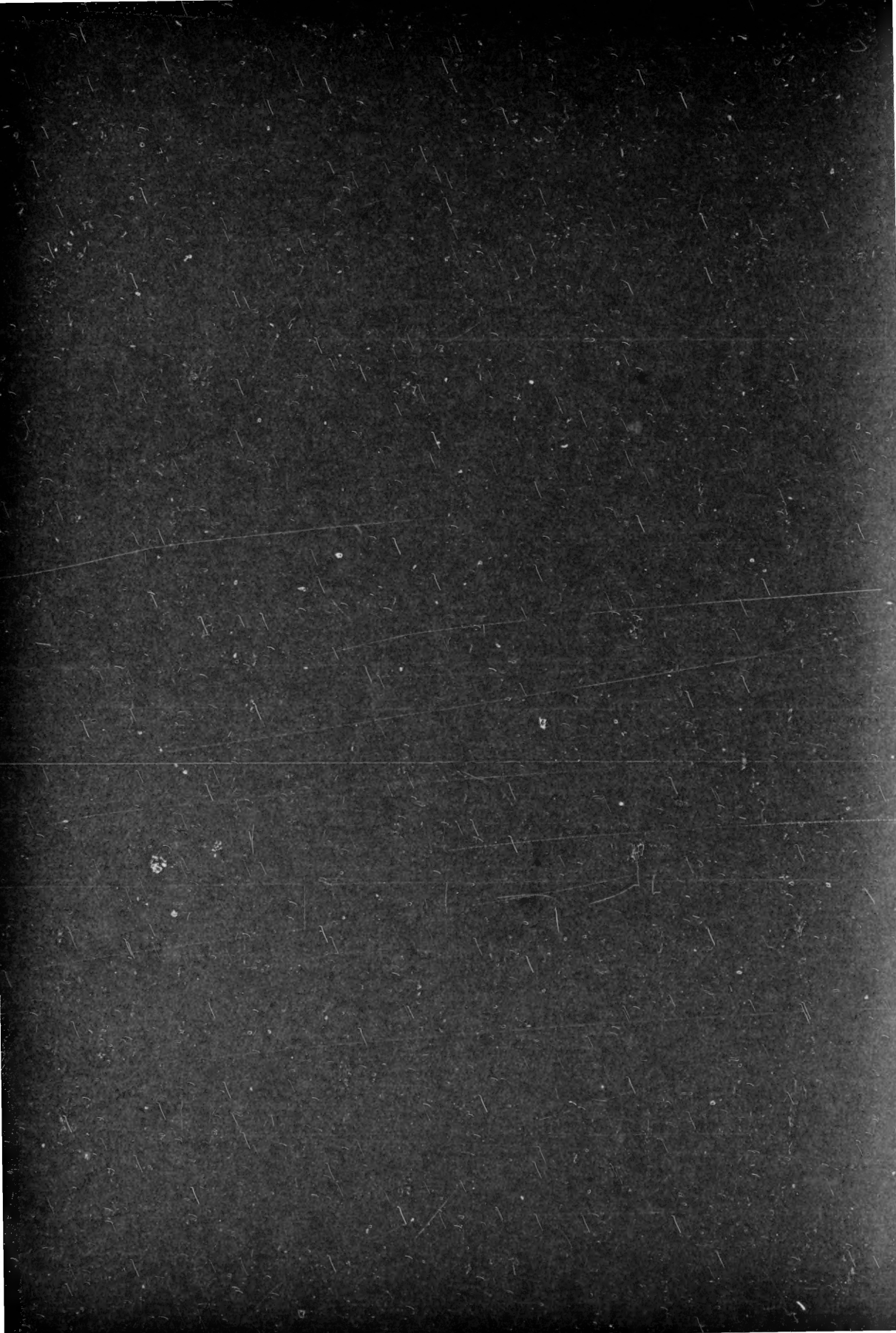

QUESTIONS PRESENTED

1. Given the conflicts of testimony and interpretation of factual developments in this case, did the courts properly construe the evidence and inferences therefrom in the light most favorable to Petitioner in accordance with standards for summary judgement? (Fed.R.Civ.P. 56)

2. Did the courts take proper notice of the provisions of the Uniform Customs and Practice for Documentary Credits (UCP), as sanctioned by the Uniform Commercial Code, Article 5-102(4), in interpreting the facts bearing on First National Bank's actions in regards to this letter of credit?

TABLE OF CONTENTS

Page

Questions Presented for Review.. 1

Table of Authorities..... iii

Statement of the Case..... 2,3

Facts..... 4-9

Reasons for Granting Writ of Certiorari..... 10-14

Conclusion..... 15-17

TABLE OF AUTHORITIES

Cases: Page

Schweibish v. Pontchartrain State Bank, La.App (1980) 389 So.2d 73 Writ Refused 396 So 2d 885 8

Northern Trust Co. v. Community Bank, UCC Reporting Service 2d 418 17

Statutes Under Rules:

Sup.Ct.R. 10.1(a) 2,10

UCC Uniform Commercial Code Art.5 11

Fed.R.Civ.P. 56 (c) 17

In The Supreme Court of the

United States
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No. 90-613

BLACK CRYSTAL COMPANY, INC.,
Petitioner
v.
FIRST NATIONAL BANK OF LOUISVILLE

Respondent

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

PETITIONER'S REPLY to Brief in Opposition to PETITION for WRIT of CERTIORARI

Petitioner prays this Court to grant Writ of Certiorari on the grounds that the Sixth Circuit Court of Appeals

(Sixth Circuit) sanctioned such a departure from the accepted and usual course of judicial proceedings by the Federal District Court as to call for this Court's power of supervision [Supreme Court Rule 10.1(a)].

STATEMENT OF THE CASE

This is a case for wrongful dishonor of an irrevocable, negotiable Letter of Credit.

Petitioner takes exception to Respondent's statement that it "embarked on a course of missed deadlines" on appeal. Only a few cases concerning a bank's malfeasance against the Beneficiary of a letter of credit have been considered in Federal Courts; it is most difficult for a small business to obtain knowledgeable counsel, most of whom are on retainer to banks. In this case, Petitioner's attor-

neys abruptly withdrew claiming inexperience with such arcane matters. Petitioner's efforts to appear Pro Se were accepted first, then rejected by the Sixth Circuit after strenuous arguments by Respondent. New counsel was obtained and the case reinstated.

Respondent's claim that the Petitioner incorrectly framed the issues to involve letters of credit is self-serving; the Writ is sought precisely because the lower courts granted and upheld summary judgement contrary to careful consideration of the specifics of the case, applicable law (UCC-UCP), and standards for imposing summary judgments.

Restating the Sixth Circuit finding that there is no genuine issue of material fact merely points to the Court's lapse in analysis rather than to

its understanding of the matter put before it. The District Court adapted almost verbatim the Respondent's version of the case; the Court of Appeals, against the preponderance of documentary evidence presented by Petitioner, adopted the lower court opinion, "as though it were our own."

In finding the Petitioner's evidence and questions regarding the bank's conduct insufficient to require a jury trial the lower courts mistook the Respondent's torrent of verbiage for the truths they were bound to pursue.

FACTS

Respondent commented on Petitioner's "convoluted statements, commingled legal arguments, and misstatement of facts." Petitioner

responds that it structured its presentation of the chain of events to include appropriate references, with documentation, to:

1. Expert testimony concerning the status and role of United Kentucky Bank the negotiating bank (Parson's affidavit).

2. Assignments of Proceeds/drafts issued early on by United Kentucky Bank as the negotiating bank.

3. Acceptance by United Kentucky Bank of required commercial documents, including Bill of Lading, prior to Letter of Credit expiration date.

4. Telexes concerning Beneficiary's request that United Kentucky Bank confirm the credit, as well as Respondents malicious

"Urgent" telex interfering with above request of Beneficiary, thus destroying relationship between Beneficiary and United Kentucky Bank.

5. Telexes related to Respondent Banks failure to utilize key test procedure to authenticate the credit to carriers bank (Banks routinely use coded messages as security measure for electronic money transfer around the world)

6. Telexes showing Respondents improper interfering communication with the carrier altering the terms of the credit/assignment of proceeds (from irrevocable Letter of Credit to revocable Letter of Credit), thus destroying the charter contract.

Contrary to Respondent's illusions, a case can only be properly argued with specific examples. These portions of the Petitioner's evidence, and much more, have been recited to demonstrate that the weight of the evidence favoring Petitioner is such as to preclude summary judgement.

Throughout these lengthy proceedings in the courts, Respondent has failed to offer any justification for its actions in contravention of its duties and responsibilities.

Significantly, the only "fact" mentioned in Respondent's Brief in Opposition is to the "uncontroverted" testimony of the United Kentucky Bank officer that it was "never" the negotiating bank. By ignoring Petitioner's evidence that United Kentucky Bank prepared a memo to its staff giving instructions as to procedures for negot-

iating this Letter of Credit transaction,issued assignments of proceeds and attempted to make the 2nd tender of documents to the Respondent - the whole of Respondent's argument should become suspect; proof in refute of Respondent's testimony clearly demonstrates its willingness to deceive the Court. The Respondent attempts to convince this court that the Letter of Credit expired before the presentation of the documents and draft. The Uniform Customs and Practices for Documentary Credits, requires the return of invoice and bill of lading to the beneficiary [Schweibish v. Pontchartrain State Bank, La. App.(1980) So. 2d 731 (Writ refused), 396 So. 2d 885]. Banks did not inform Beneficiary of Letter of Credit of its decision to dishonor such letter and did not return invoices and

bill of lading to Beneficiary. Therefore Banks could not dishonor the Letter of Credit on grounds that documentation was not in strict compliance with the terms of credit. The Petitioner and United Kentucky Bank testimony clearly stated that the original Letter of Credit has never been forwarded.

In light of Respondent's reliance at this point on a single deposition, how can it be argued that there is no genuine issue of fact involved? Examination of the deponent and introduction of the relevant material evidence of his activities would surely belie this bank officer's testimony.

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI

Supreme Court Rule 10.1(a) states that this Court may intervene if another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court.

Petitioner contends that the Sixth Circuit Court of Appeals sanctioned the improper granting of summary judgement by the District Court, Louisville KY.

A. The District Court failed to consider Petitioner's arguments concerning Respondent's conduct violative of UCC-UCP regulations governing the handling

of letters of credit (Uniform Commercial Code - Article 5). For example, the impropriety of Respondent's confirmation/Amendment No.9 later had grave consequences as it placed Respondent in a position allow it to alter the conditions of the assignment of proceeds and drafts issued by Petitioner and his negotiating bank (United Kentucky Bank), and accepted by the vessel's agent. This intermeddling led to the carrier's repudiation of its contract for carriage - and the unjustifiable prevention of Petitioner from meeting the shipping date.

The District Court dismissed the relevance of this confirmation/Amendment 9 and its disastrous consequences by stating that "it merely added another, parallel set of obligations

into the milieu." The Sixth Circuit did not comment on this aberrant conclusion!

Respondent violated the law in unilaterally amending (altering!) the terms and conditions of the letter of credit. Its actions were the proximate cause of the late shipping date, later claimed by Respondent as justification to dishonor the letter of credit.

Petitioner has discussed this chain of events extensively in prior submissions to the lower courts, and can only surmise that in reaching their conclusions they failed to observe the evidence and misapplied the law.

B. A motion for summary judgement is intended as a device to pretest issues developed in the pleadings to determine whether they are substantial enough to

warrant trial. It must be established beyond question that the issues raised are not genuine, because the motion is not a substitute for trial. Summary judgement should not be imposed lightly and without the most serious deliberation, as at best, it tends toward subjectivity.

C. The Sixth Circuit Improvidently Affirmed Summary Judgement.

The Court of Appeals reason given in its decision and oral argument was that United Kentucky Bank did not act as the negotiator of the credit - just because the bank officer said that it did not! This reasoning was reached after Petitioner had submitted hard evidence, not conjecture, substantiating its claim that United Kentucky Bank was and did act as its negotiating bank.

Without question this is a triable issue of fact which should properly be brought before a jury. Summary relief cannot be justified where the disputed question of fact turns exclusively on the credibility of Respondent's witness. Certainly, Petitioner is entitled to a trial at which all the circumstances may be developed for the consideration of a jury as trier of fact.

CONCLUSION

The "peculiar gravity and general importance" of this case lies in its implications for the future of U.S. export trade and commerce in general.

Respondent would have this Court believe that this case represents nothing more than a "simple commercial case." It is not simple at all, as it involves the reliability and credibility of letters of credit - the primary method of foreign trade financing. The conduct of the bank in this matter, apparently condoned by the lower courts, suggests that it is difficult to ascertain just what assurances are made to the Beneficiary or holders of assignments of proceeds of

such a credit. The consequences for international trade are vast.

Petitioner asserts that the standards for summary judgement were not met, and that on appeal, the Sixth Circuit failed to consider the inferences from the evidence "in the light most favorable" to Petitioner. The Respondent attempts to convince the court that the Petitioner concurs with the facts as set forth by the District Court and the Sixth Circuit. This is an inaccurate statement. The Petioner does not concur.

In its conclusion , Respondent stated (page 6 paragraph 2) that "..,the Respondent had the obligation to pay only upon presentation of a draft, in conformity with the Credit." This belief is contrary to the recent Ninth

Circuit decision (Northern Trust Co. v Community Bank, 8 UCC Reporting Service 2d 418) which holds that confirming bank is not entitled to independent timely presentment of a draft, unless required by letter of credit provisions.

"Whose truths are believable" and "What evidence is credible" might sum up the questions about the propriety of the decision for summary judgement [Fed.R.Civ.P. 56 (c)]. These are also the very questions which are required to be submitted to a jury.

Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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